MDI Commercial Services *and* International Brotherhood of Electrical Workers, Local 160, AFL–CIO. Case 18–CA–13580

November 8, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On January 17, 1997, Administrative Law Judge William J. Pannier III issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified and to adopt the recommended Order.

We adopt the judge's findings and conclusions that the Respondent committed violations of Section 8(a)(1) and (3) of the Act in response to the union organizing activities of its employees. One such violation involved the unlawful termination of employee Edward Saric. We agree with the judge's finding of this violation for the following reasons.

Until October 31, 1994, Edward and his wife Regina Saric worked for the Respondent at its Grand Rapids facility. On that date, their employment ceased. As more fully described in his decision, the judge found, and we agree, that Regina did not voluntarily quit her employment but rather that Lorraine Bunn, the plant manager, unlawfully discharged her.

Before she left the plant that morning, Regina spoke with Edward. She told him that she was leaving work because she had a big headache from Bunn's earlier ''harassment'' about her distribution of a materials safety report to employees. Not long after he spoke with his wife, Edward saw Bunn while he was working inside the plant, and she asked him where Regina was. He said that Regina had gone home because of a headache. Bunn replied, ''Well, that's an unexcused absence. That's good.'' Nothing more was said, and Edward continued with his work. About 10 to 15 minutes later, Supervisor Catlett approached Edward and told him to report to the office.

Bunn was waiting for Edward in the office. Edward credibly testified that Bunn began by asking what was going on with Regina and him about this ''union crap.'' In reply, Edward denied any knowledge about this subject. Edward credibly testified that Bunn then said that she knew that the Sarics were organizers and she would not ''tolerate'' such activities.[2]

The conversation continued with Bunn asking Edward to return the plant building keys which he used to perform his job because she was purportedly concerned about the safety of the building and she could not trust him anymore. She assured him that his job duties would remain the same. Her unanticipated comments so disturbed Edward that he said that he was quitting his employment. Bunn readily accepted his resignation. She gave him a blank termination request form which he immediately completed and signed.

The judge found that Bunn had to know that her actions would greatly affect Edward and raise heightened concern about the security of his job assignments. He also discredited Bunn's asserted explanation for having Edward relinquish his keys and her feigned attempts to assure him that his job responsibilities would remain the same. On this point, the judge found that Bunn's new concern about building safety and security, which was allegedly prompted by Regina's departure with a headache that day, made no sense now and could not have made any sense to Edward on October 31. The judge stated, inter alia, that ''[i]n these circumstances, it would not be illogical for an employee to believe that his termination was imminent because he had engaged in statutorily protected activities.'' We agree with this rationale. Although Bunn did not directly state that Edward was ''discharged'' that morning, her statements and actions would reasonably lead Edward to believe that he was soon to be discharged. See *Ridgeway Trucking Co.*, 243 NLRB 1048, 1049 (1979). Accord: *Romar Refuse Removal*, 314 NLRB 658, 670 (1994) (and cases cited therein).

In *Ridgeway Trucking Co.*, an employer told its drivers who were engaged in a protected work stoppage to leave the premises unless they were going to go to work. The Board concluded that this statement constituted an unlawful discharge of the drivers. In

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We also find no merit in the Respondent's allegations that the judge's resolutions of credibility, findings of fact, and conclusions of law are the result of his bias and lack of objectivity. There is no basis for finding that bias or lack of objectivity exists merely because the judge resolved important factual conflicts in favor of the General Counsel's witnesses. *NLRB v. Pittsburgh Steamship Co.*, 337 U.S. 656, 659 (1949).

No exceptions were filed to the judge's findings that Edward and Regina Saric were not supervisors within the meaning of Sec. 2(11) of the Act.

[2] On Friday, October 28, 1994, the Respondent received a copy of the Union's representation petition and learned about the Union's campaign and the Sarics' purported union involvement. When Bunn was out of town on business on that day, two supervisors told her that the Sarics were signing up employees and handing out union cards outside the plant at a local convenience store. However, this information about the Sarics was not entirely accurate. The judge found that Edward had signed a union card in the presence of other employees, but neither Saric had engaged in any union solicitation of employees as of October 31.

reaching this conclusion, the Board applied the following test.

> The test for determining ''whether [an employer's] statements constitute an unlawful discharge depends on whether they would reasonably lead the employees to believe that they had been discharged'' and ''the fact of discharge does not depend on the use of formal words of firing. . . . It is sufficient if the words or actions of the employer would logically lead a prudent person to believe his tenure has been terminated.'' [Footnotes omitted.]

In the instant case, Edward was ordered, without explanation, to Bunn's office. He last spoke with her only a short while earlier, and her comments that it was ''good'' that his wife had ''an unexcused absence'' suggested difficulties ahead for Regina Saric. Against this backdrop, his meeting with Bunn took place. She immediately chastised him and his wife for engaging in union activity, which she derogatorily referred to as ''union crap.'' She then accused the Sarics of being ''organizers,'' which suggested that Edward had taken a leadership role in the union movement. Next, in very clear terms, Bunn communicated a strong animosity toward union activities by admonishing Edward that she would not ''tolerate'' such activities. It was not too difficult a leap for Edward to perceive, at that point, that he was in very deep trouble with Bunn over this union matter. Bunn quickly confirmed his fear of reprisal. Bunn abruptly asked Edward to return the plant building keys to her. She coupled her request with the pointed statement about not being able to trust him anymore. Bunn thus made it obvious to Edward that his employment was in jeopardy because the necessary foundation of trust between employee and boss was no longer present. She did not dispel this notion when she had him immediately sign a resignation form. Accordingly, on the basis of the foregoing, we find that the Respondent effectively discharged Edward Saric in violation of Section 8(a)(3) and (1) of the Act.

The Respondent argues that Edward quit his employment because he was angered by the forced surrender of the plant keys. Although we acknowledge that Edward was very upset about returning his keys to Bunn that day, we note that Edward's testimony supports our view that Bunn's statements and actions (which are described above) coupled with her request for the plant keys actually led him to reasonably believe that his discharge was imminent.[3]

Accordingly, on the basis of the foregoing, we find that the Respondent effectively discharged Edward Saric in violation of Section 8(a)(3) and (1) of the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, MDI Commercial Services, Grand Rapids, Minnesota, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

---

[3] Edward testified as follows:

QUESTION (By General Counsel): . . . . So let me ask you a little bit about what happened on your last day of work. . . . Why don't you go through the day with me?

. . . .

ANSWER (By Edward Saric): And so I went into the office, sat down and Lorraine just started about this union, what is going on, what are you two up to, all this union crap. She won't tolerate any union activities. She just didn't want to hear about it. . . . So I said I don't know anything about [the] union. I don't want to jeopardize anything and she asked for the keys of the building from me. I said ''Why would you need my keys?'' She said, ''Well,'' she said, she can't trust me with my work anymore. She needs somebody responsible for—to do these duties and I was real surprised because nobody ever had any complaints about my work. Nobody ever said anything that I did wrong or anything to that matter.

. . . .

QUESTION: . . . . So she asked for your keys back and then did you give her your keys back?

ANSWER: Yeah, I gave her my keys. I had a set of keys on my keychain. I gave her that and some other keys were in my locker so I went back to take those keys and I gave her back everything, and I asked her to use the phone to call my wife because we drive to work in [the] same vehicle and she left earlier. So I called my wife and told her to come and pick me up because I didn't have a way to get home, and after I finished the conversation Lorraine was in the other office, opened [the] door and she just said, ''So you are quitting?'' Those were her words.

I said, ''Well, I needed a ride home and,'' I said, ''you took my duties away, my keys.'' I said, ''What else is there for me.'' I said, ''Yeah, I might as well. I'll quit.'' And she already had some paper there that she gave me to sign and said that's just a formality or something, and I was just angry and disappointed in the way she acted and the anger and I just signed the paper and I walked out.

QUESTION: Okay. Why did you call your wife after she—after Lorraine Bunn asked for your keys back and you said you went in and called your wife to pick you up. Why did you do that?

ANSWER: Well, after she took my keys away and I believe the rest of my duties—those were one of the main duties that I had. I believed I had no work there even though she didn't say it yet but I just believed there was nothing else for me so I would go home for that day at least just to let her cool down and see what will happen tomorrow morning.

Polly Misra, Esq., for the General Counsel.
Donald W. Selzer, Jr. and *Andrew J. Voss, Esqs. (Oppenheimer, Wolff & Donnelly)*, of St. Paul, Minnesota, appearing for the Respondent.
Lynnie Martin, Esq., of Grand Rapids, Minnesota, for the Charging Party.

DECISION

STATEMENT OF THE CASE

WILLIAM J. PANNIER III, Administrative Law Judge. I heard this case in Grand Rapids, Minnesota, on August 20

through 23, 1996. On August 30, 1995, the Regional Director for Region 18 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing, based on an unfair labor practice charge filed on April 25, 1995, alleging violations of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). All parties have been afforded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, and to file briefs. Based on the entire record,[1] on the briefs which were filed, and on my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Introduction*

Minnesota Diversified Industries or MDI, Inc. (MDI) was founded by John DuRand, its president, and has operated for more than two decades. During approximately 1992 a decision was made to form two Minnesota subsidiary corporate divisions. They would provide careers for disabled people and, also, for disadvantaged persons living in so-called corecity areas. Both subsidiaries would be nonprofit corporations which meant that neither subsidiary would have shareholders. Instead, any profit would either be reinvested or distributed to employees of the subsidiary, as determined by each's board of directors.

Each of the two subsidiaries serviced different types of customers. One, MDI Government Services, would seek contracts under Federal legislation which set aside contracts for nonprofit corporations which agreed that at least 75 percent of the work force would be comprised of disabled and disadvantaged individuals. The other subsidiary would seek contracts to assemble and package a variety of products for private commercial enterprises. That subsidiary became MDI Commercial Services (Respondent).[2] Once those two corporate subsidiaries had been formed, MDI became a nonoperating parent company, managing assets and performing research and development of new enterprises.

As part of the restructuring, construction of two plants was undertaken: one in Hibbing, Minnesota, and the other in Grand Rapids, the facility at issue in the instant case. Financing for that construction was provided by Blandin Foundation. It extended a project related investment of $1.2 million for construction of the Grand Rapids facility and of $500,000 for construction of the Hibbing facility. In reality those were loans which could be converted into grants, and forgiven, only so long as certain criteria were satisfied. If not, repayment of 20 percent of principal, plus interest, had to be made annually.

The Grand Rapids facility opened during early 1994. The original plans contemplated operation there of an electronic data process and management program, called remote bar coding, for the United States Postal Service. In consequence, that facility was to be operated by MDI Government Services. The Postal Service contract did not materialize, however. As a result, commercial customers were sought for that facility and, in turn, operations there began, and were continued during 1994 and, at least, during the first half of 1995, by Respondent.[3] As will be seen, fluctuations occurred in business at Grand Rapids and, in turn, that led to fluctuations in employment there.

Staffing at Grand Rapids commenced on February 1, 1994. In light of the complaint's allegations, certain individuals should be identified at the outset. Edward Saric—an alleged discriminatee whom Respondent contends, contrary to the General Counsel, had been a statutory supervisor when employed by it—was hired on February 1. His wife Regina—also an alleged discriminatee whom Respondent contends, contrary to the General Counsel, had been a statutory supervisor—was hired on June 13, 1994. On April 4, 1994, Respondent hired Russell Edward Catlett as an assembly worker. He was elevated to the position of line lead during the latter half of the following September. Similarly, Carol Fink was hired as an assembly worker on June 6, 1994, and was promoted to line lead during the latter half of the following September or during early October. On April 7, 1994, Lorraine Bunn was hired as plant manager for the Grand Rapids facility. On September 1, 1994, James Maher became Respondent's president and chief operating officer. The parties agree that at all times material to the allegations in the instant proceeding, Maher, Bunn, Fink, and Catlett, as well as John DuRand, had been statutory supervisors and agents of Respondent.

In late September or early October 1994, one or more of Respondent's employees contacted International Brotherhood of Electrical Workers, Local 160, AFL–CIO (the Union).[4] An organizing campaign ensued, leading to filing of a representation petition in Case 18–RC–15673 on Tuesday, October 25, 1994. The parties stipulated that, according to the certified return receipt, a copy of that petition had been received by Respondent on Friday, October 28.[5]

The complaint alleges that on the following Monday, October 31, Respondent violated the Act because Bunn assertedly threatened Edward Saric by saying that she knew who had started the Union's organizing campaign and would not tolerate it, coercively interrogated Saric, said that she could no longer trust him, took away his plant keys and removed some of his duties, and otherwise invited him to quit. In fact, Saric did resign that day. The General Counsel argues that, in the circumstances, his resignation had constituted a constructive discharge which violated Section

[1] The unopposed motion to correct record is granted.

[2] Respondent admits that it is an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act. That admission is based on the admitted factual allegations that, in the course of its business operations during the 12-month period ending on August 30, 1995, Respondent derived gross revenues in excess of $500,000 and, during that same period, purchased goods valued in excess of $50,000 from suppliers located in Minnesota which, in turn, had purchased those goods directly from sources located outside of the State of Minnesota and, further, sold goods valued in excess of $50,000 to Minnesota customers which, then, sold those same goods directly to customers located outside of Minnesota.

[3] There is some indication in the record that, by the time of the hearing, the Grand Rapids facility was being operated as part of MDI Government Services.

[4] At all material times, the Union has been a labor organization within the meaning of Sec. 2(5) of the Act.

[5] That petition was withdrawn on November 9, 1994, to be replaced with a new petition filed on that same date in Case 18–RC–15678.

8(a)(3) and (1) of the Act. Also on October 31 alleges the complaint, Respondent unlawfully discharged Edward Saric's wife, Regina. The complaint further alleges that, on November 1, 1994, Line Lead Catlett threatened that adverse action, including termination, would be suffered by employees who engaged in activities supporting the Union. In addition, on and after that date, Catlett is alleged to have threatened that DuRand hated unions and would close the Grand Rapids plant if the Union was selected by employees there as their collective-bargaining representative.

After becoming Respondent's president and chief operating officer on September 1, 1994, Maher began making periodic trips to the Grand Rapids facility, initially on ''an introductory visit'' in mid-September, he testified, and thereafter pursuant to a commitment for periodic visits there. For example, he testified that he returned to Grand Rapids for another visit during early to mid-October, on November 4, again on November 9, and during early December 1994. There also was another November visit during which DuRand accompanied Maher.

On each of those occasions, Maher met with Respondent's employees. The complaint alleges that he unlawfully interrogated employees as to why they supported the Union, solicited and promised to remedy employees' grievances, encouraged employees to abandon the Union in favor of an employee committee, and threatened that while he would like to see wage increases and improvements in employment terms and conditions, nothing could happen so long as the union situation existed. Moreover, it is alleged that, when he had visited the Grand Rapids facility, DuRand had threatened that wages might go up without a union, but that wages would go down if employees selected the Union to represent them.

The complaint alleges that during a November or December 1994 conversation, Bunn prohibited an employee from talking with coworkers about the Union and, during that same conversation, Fink coercively interrogated that employee about what was going on with the Union. On December 13, 1994, it is further alleged, Catlett engaged in surveillance of the Union's meeting with Respondent's employees and, further, again threatened that Respondent would close because of the Union.

The representation election arising from the petition in Case 18–RC–15678 was conducted on December 16, 1994. Twenty ballots were cast in favor of the Union, but 53 employees voted against representation by it. The complaint alleges that on the day before that election, Respondent issued an unlawfully motivated disciplinary warning notice to known union supporter Thomas E. Manthey.

On January 18, 1995, Respondent laid off most Grand Rapids employees. The General Counsel does not challenge the legality of Respondent's motivation for having done so, given the lack of work then existing at Grand Rapids. However, though almost all of the layoffs had been characterized as temporary, three of them were announced to be permanent: those of Ricky Thayer, Keith L. Hawkinson, and Dennis Morgan. While the legality of Respondent's motive for permanently laying off Morgan is not contested, the complaint alleges that the permanent layoffs of Thayer and Hawkinson had been motivated by considerations unlawful under the Act.

As business picked up during the late winter and spring of 1995, Respondent periodically recalled employees whom it had laid off on January 18, 1995. In addition, it began hiring new employees on April 3, 1995. By April 26, it had hired almost 60 new employees.[6] Yet, not until April 24 did Respondent recall general assembly and packaging workers Michelle R. Bibeau, Shawnee Johnson, LaVonne MacAdams, Thomas E. Manthey, Bobbi McNeil, Anthony Parker, Michael F. Steffes, Paul O. Thompson, and Richard A. Yuenger. And it was not until April 26 that general assembly and packaging worker Douglas Jaeger was recalled. All of them had been supporters of the Union and, in consequence, the General Counsel alleges that Respondent had delayed recalling them from layoff because each had ''formed, joined, or assisted the Union and engaged in other protected concerted activities, and to discourage employees from engaging in these activities.''

B. *The Status of Edward and Regina Saric*

''[T]he Taft-Hartley amendments exclude supervisors from the protection of the Act.'' *Beasley v. Food Fair of North Carolina, Inc*., 416 U.S. 653, 656 (1974). Accordingly, ''supervisors are generally excluded from the Act's coverage,'' *Pontiac Osteopathic Hospital*, 284 NLRB 442, 442 (1987), and, under the Act, employers possess ''the right to discharge [their] supervisors because of their involvement in union activities or union membership[.]'' (Citations omitted.) *Florida Power & Light Co. v. Electrical Workers IBEW Local 641*, 417 U.S. 790, 808 (1974). These principles provide the basis for Respondent's threshold argument that, whatever may have been said to Edward Saric and whatever personnel actions may have been directed against the Sarics, there can be no conclusion, based on those statements and actions, that the Act had been violated. For, contends Respondent, both Sarics had been statutory supervisors while employed by it.

''[T]he burden of proving that an individual is a supervisor is on the party alleging such status'' (citation omitted) and, in evaluating whether or not that burden has been met, ''[t]he Board has a duty not to construe the statutory language too broadly because the individual found to be a supervisor is denied the employee rights that are protected by the Act.'' (Citation omitted.) *Azusa Ranch Market*, 321 NLRB 811 (1996). Here, a preponderance of the credible evidence fails to support Respondent's contention that Edward and Regina Saric, or either of them, had been a statutory supervisor while employed by it at Grand Rapids. To the contrary, the testimony of Respondent's witnesses—especially that of Bunn, Maher, and Catlett—appeared to be no

[6] Evidence of identities of recalled and newly hired employees is provided from four sets of documents: G.C. Exhs. 12, 13, 14, and 26, all of which were prepared by, or on behalf of, Respondent. Comparison of the four multipage exhibits, however, discloses some disparities among them with regard to certain names. I draw no adverse inference from those disparities, nor should any such inference be drawn in light of the numbers of individuals involved. Indeed, none of the disparities are particularly material to resolution of the issues presented by the complaint's allegations. Still, anyone reviewing this decision, and record on which it is based, should be aware that review of merely a single exhibit, or even of two or three of them, will not suffice to provide firm conclusions concerning the status of all employees recalled and hired by any particular date.

more than an effort to construct a defense to the alleged unfair labor practices directed against the Sarics.

Edward Saric had been one of the first persons employed at Grand Rapids by Respondent. In fact, he had begun working at the facility there a few days before it opened for operations. Yet, although he had been interviewed by Lisa Lovelein Stock, then MDI's director of employee services, at no point when she testified as Respondent's witness did Stock claim that she had interviewed Saric for a supervisory position.

Maher testified that, when he had become Respondent's president and chief operating officer, he had understood Edward Saric's title to be that of ''Maintenance manager.'' After Saric left Respondent's employment on October 31, 1994, Respondent prepared and posted a job description which recited that there was a vacancy for ''Maintenance Lead.'' As mentioned in subsection A, above, ''lead'' is the title which undisputed statutory Supervisors Catlett and Fink possessed at all times material to the Complaint's allegations. Yet, ''it is Board law that an employee's title does not determine his status.'' *Waterbed World*, 286 NLRB 425, 426 (1987). ''The important thing is the possession and exercise of actual supervisory duties and authority and not the formal title.'' *NLRB v. Southern Bleachery & Print Works*, 257 F.2d 235, 239 (4th Cir. 1958), cert. denied 359 U.S. 911. Accord: *NLRB v. Harmon Industries*, 565 F.2d 1047, 1051 (8th Cir. 1977).

As to his duties, Edward Saric testified that, using keys given to him by Respondent, he would open the Grand Rapids facility each workday, turn on the lights and check the heating. At the end of the workday he would check to be certain that ''everything is right'' and lock up. During workdays, he testified, Saric maintained the physical condition of the plant, including the landscaping. If ''physical plant problems'' arose, Saric testified that he would assess the situation and recommend solutions. He also was responsible for developing jigs and fixtures so that particular jobsites would accommodate employees' disabilities. In sum, nothing disclosed by Edward Saric's description of his duties showed that anything which he had done involved exercise of any supervisory power enumerated in Section 2(11) of the Act.

Nor was such a showing made by Bunn's description of work ordinarily performed by Edward Saric: ''He was more or less doing shipping and receiving, plant maintenance, all the yard work around the plant. He would open the plant from time to time. He would also build jigs and fixtures for persons with disabilities to help them do jobs.'' She testified further that, ''He was also responsible for the grounds, and we had seeded a new lawn, so there was plenty of work taking care of the lawn.'' Similarly, Catlett testified that Edward Saric ''was the maintenance man at the plant. He oversaw the—cleaning the building and whatever else. He was the grounds worker, kind of a jack of all trades, and part-time supervisor. He was considered a supervisor.'' Of course, consistent with the discussion above, conclusionary characterizations, such as the latter quoted portions of Catlett's testimony, ''without supporting evidence, do[] not establish supervisory authority.'' (Citation omitted.) *Sears, Roebuck & Co.*, 304 NLRB 193, 193 (1991).

Shorn of such characterizations, nothing in the foregoing descriptions of Edward Saric's actual duties provides a basis for concluding or inferring that he had functioned as other than a shipping and receiving employee, groundskeeper, and custodian. That conclusion is fortified by the ''Job Duties'' portion of Respondent's own above-mentioned vacancy posting after Saric had resigned:

> 1. Maintaining the overall excellent condition of the physical plant including: floors, walls, woodwork, parking lot, windows, lawn, shrubs and trees.
>
> 2. Assisting the Plant Manager in setting up procedures and developing solutions [to] maintain the excellent condition of the plant.
>
> 3. Recognizing potential physical plant problems (equipment, safety, building) and recommending solutions.
>
> 4. Mowing with a riding lawn mower, moving snow with a tractor and riding snow blower. Operation of the sprinkler system, furnace and electrical systems.
>
> 5. Developing jigs and fixtures as needed.
>
> 6. The coordination of work with supervisors within the plant and with employees in other divisions of MDI.

To be sure, such duties are important for operation of Respondent's facility. Respondent appears to have recognized as much. For, it regarded Edward Saric as part of its ''management team'' and included him in the periodic management meetings conducted at Grand Rapids. Still, these are at best secondary indicia of supervisory status under the Act. See, e.g., *NLRB v. Clark Manor Nursing Home Corp*., 671 F.2d 657, 659 (1st Cir. 1982); *NLRB v. Koplin Bros. Co*., 379 F.2d 488, 490 (7th Cir. 1967). Though aides in evaluating the existence of supervisory status, secondary indicia are not substitutes for the statutorily prescribed powers of Section 2(11) of the Act. That is, secondary indicia are not ''accorded litmus paper significance in the absence of solid evidence of the actual possession of supervisory responsibility.'' (Citation omitted.) *Oil Workers v. NLRB*, 445 F.2d 237, 242 (D.C. Cir. 1971), cert. denied 404 U.S. 1039 (1972).

Here, there is no evidence that Edward Saric possessed any of the powers enumerated in Section 2(11) of the Act. Respondent points to testimony showing that, at one time, Saric had recommended that Anthony Parker be selected to work as Saric's assistant and that, while doing so, Parker had been told what to do by Saric and, further, that Saric had instructed Parker to redo whatever work the latter had performed improperly. But, there are several points which negate any conclusion of supervisory status based on such testimony.

First, Edward Saric testified, without contradiction, that it had been Bunn who had made the decision to select another maintenance employee—''Lorraine just told me that I needed help in maintaining the building . . . so that means I wouldn't have to stay overtime to do the janitorial work''—and that, once applications for the job had been received, Bunn had given those applications to Saric and ''asked [him] if there was somebody that [he thought] would do a good job[.]'' After Saric said that he thought ''Tony Parker would be a good worker,'' Bunn chose Parker for the maintenance position. So far as the evidence shows, it had been Bunn who retained authority to select Parker for the position, with Saric serving no more than the role of ''trusted nonsupervisory employee [who was] looked to for [a]

suggestion[],'' *Northern Virginia Steel Corp. v. NLRB*, 300 F.2d 168, 172 (4th Cir. 1962), as to who might be qualified.

Second, that conclusion is fortified by Saric's undenied testimony that, after passage of about a month, Bunn had decided that she was not satisfied with Parker's work and, without ascertaining Saric's opinion, removed Parker from the maintenance position, replacing him with another individual. Saric's opinion was not that time sought as to the qualifications of the replacement. Nor is there evidence that his opinion had been sought with respect to any other transfer of employee to another job. The Board has long held that it does ''not consider [a] few isolated instances, in view of the record as a whole, to be sufficient to establish . . . possess[ion] of supervisory authority contemplated by Section 2(11) of the Act.'' *Commercial Fleet Wash, Inc*., 190 NLRB 326, 326 (1971). See also *NLRB v. Orr Iron, Inc*., 508 F.2d 1305, 1307 (7th Cir. 1975). Consequently, even if it could be concluded that Edward Saric had effectively recommended Parker's selection for the maintenance job, that single recommendation would not suffice to establish that Saric had been a statutory supervisor, in light of the absence of evidence that he had ever done so on any other occasion, though obviously there had been an opportunity for him to have done so following Parker's removal as maintenance worker.

Third, Saric testified that he had shown Parker how to perform the maintenance work and, whenever Parker had failed to properly perform a particular task, would ''tell him to fix it up next time, or just get him back on the job to fix it up[.]'' Still, Parker had been performing work identical to that which Saric had been performing. ''Any direction or instruction [by Saric to Parker was] attributable essentially to [Saric's] familiarity with the operation of the'' Grand Rapids facility. *Para-Chem Southern, Inc*., 258 NLRB 265, 268 (1981). Further, so far as the evidence shows, those duties—maintaining the physical condition of the plant's interior and exterior—''were routine functions [which] need[ed] no responsible direction to carry them out,'' *Big Star No. 185*, 258 NLRB 300, 300 (1981), and there is no evidence that Saric exercised direction of other than a routine nature, not requiring exercise of independent judgment, based on other than his own superior knowledge of what had to be done. See, *NLRB v. Harmon Industries*, supra, 569 F.2d at 1049–1050; *Consolidated Services*, 321 NLRB 845 (1996).

Even though Saric may have told Parker ''to fix it up,'' whenever the latter incorrectly performed a maintenance duty, there is no showing that such incidents had occurred with any frequency. That is, that they had occurred other than spasmodically. More significantly, there is no showing that such incidents had any adverse affect on Parker's employment record. To be sure, Bunn eventually took the maintenance job away from Parker. However, she never testified that she had done so because of correction by Saric of maintenance work misperformed by Parker. And there is no basis for inferring that Saric's corrections, whatever their number, had caused Bunn to replace Parker as maintenance worker. Bunn never denied with particularity Saric's testimony that he had not been consulted by Bunn about that personnel action.

There is even less basis for concluding that Regina Saric had been a statutory supervisor while employed by Respondent. She had worked as a ''secretary'' in the office, testified Catlett. Bunn testified that Regina Saric did payroll, helped calculate productivity as a ratio of sales to labor, occasionally answered the phone, collated, and filed materials, and, in general, had served as Bunn's assistant. Yet, Bunn never claimed that she had delegated any supervisory powers to Regina Saric in connection with performance of those duties. So far as the evidence reveals, none of that work required Regina Saric to work with—much less give direction to—any other employee. Nor is there any specific evidence that she had possessed any of the powers set forth in Section 2(11) of the Act.

Some of Respondent's evidence consisted of generalized assertions that both Sarics had engaged in part-time supervision of line workers. Yet, Respondent's witnesses advanced no particularized evidence concerning what those generalizations meant. More specifically, there is no evidence that either Edward or Regina Saric had exercised independent judgment or responsible direction, within the meaning of Section 2(11) of the Act, in dealing with Grand Rapids assembly and packaging employees. Nor is there evidence that either Saric had exercised any such authority on other than a sporadic basis.

One point on which Respondent lays heavy emphasis is Bunn's assertion that Edward and Regina Saric had been placed in charge of the Grand Rapids facility whenever Bunn had been absent. In fact, the Sarics had been told that they were in charge on October 28 when Bunn, Fink and Catlett journeyed to Respondent's St. Paul headquarters, a subject discussed in subsection C, below. However, that is the lone occasion disclosed by the evidence when the line leads, as well as Bunn, had been absent from Grand Rapids during worktime. In fact, Fink testified affirmatively that October 28 had been the sole occasion when she, Catlett and Bunn had been away from the facility at any one time.

On other occasions when Bunn had been away from the facility, Fink testified, she and Catlett had been ''pretty much in charge together. If there was something that happened we would jointly talk it over and if we needed to we would call up the St. Paul facility for help.'' That testimony supports Edward Saric's account that, although there had been occasions when Bunn left the plant saying generally that Saric was ''in charge,'' none of the employees had ever reported to him on such occasions and, further, he never had altered his own work schedule on such occasions. Indeed, such comments by Bunn are at best ambiguous, because Saric was responsible for receiving incoming materials and for loading outgoing shipments. It could well be to those aspects of plant operations—problems arising from deliveries and pickups—which Bunn had been referring whenever she told Edward Saric that he was ''in charge''—that he was responsible for resolving whatever problems arose in those areas. Since there is no evidence that any other employee regularly worked with Saric whenever materials were received or shipments were made—other than occasionally whenever Bunn assigned someone else to help Edward Saric with a particular excess of work—there would be no opportunity for him to have supervised anyone else's work. Certainly, there is no specific evidence that Bunn had contemplated that either Edward or Regina Saric would take over Catlett and Fink's supervision of assembly and packaging employees. And there is no evidence that either Saric had ever done so.

Beyond that, there is no particularized evidence that Bunn had been absent from the Grand Rapids facility with any frequency or, moreover, that any single absence had been a prolonged one. It is settled that ''an employee does not acquire supervisor's status by reason of temporarily taking over the duties of an absent supervisor.'' *NLRB v. Sayers Printing Co*., 453 F.2d 810, 815 (8th Cir. 1971). See also *Fall River Savings Bank v. NLRB*, 649 F.2d 50, 54 (1st Cir. 1981). Further, as pointed out above, on occasions when Bunn had been absent from the Grand Rapids facility, there is no evidence that either Edward or Regina Saric ever once exercised any supervisory powers listed in Section 2(11) of the Act over even a single assembly and packaging employee. In these circumstances, there is no basis for concluding that the Sarics had spent ''a regular and substantial portion of their working time performing supervisory tasks.'' (Footnote omitted.) *Latas de Aluminio Reynolds*, 276 NLRB 1313 (1985).

In sum, the functions performed at Grand Rapids by Edward and Regina Saric led Respondent to decide that they should be accorded special status in its internal operations. However, there is no contention that such status rose to the level of conferring managerial or, in the case of Regina Saric, confidential status under the Act. Neither, in view of the considerations reviewed above, has Respondent met its burden of adducing evidence to support its contention that Edward and Regina Saric, or either, had been statutory supervisors. Therefore, I conclude that at all material times the Sarics had been employees within the meaning of Section 2(3) of the Act.

C. *Departure of the Sarics from Respondent's Employment*

Two events occurred on Friday, October 28, 1994, which provide background for alleged unfair labor practices on the following Monday, October 31, and during the immediately following days. First, it had been on that Friday that Respondent learned officially of the Union's campaign. For, as set forth in subsection A, above, a copy of the representation petition in Case 18–RC–15673 had been received by Respondent, according to the parties' stipulation. Receipt of that copy of the petition admittedly upset DuRand: ''I remember I was quite upset and I thought, you know, is everybody asleep at the plant that the first time we hear about this is when we get notice of the—whatever the official document was.'' In reality, however, receipt of the petition had not been the first notification to Respondent's officials about the Union's campaign.

Friday, October 28, had been the only workday, so far as the record discloses, when all Grand Rapids supervisors—Bunn, Fink, and Catlett—had been absent at the same time from the facility there. On that day they traveled together to Respondent's St. Paul headquarters. In the course of that trip, Bunn testified, Fink and Catlett ''had told me that Ed and Gina were signing up people at the Short Shop—a convenience store, handing out Union cards.'' Fink acknowledged that she had been asked by ''several employees'' for her opinion of the Union's organizing campaign. However, illustrating the lack of candor which he appeared to me to be demonstrating throughout his appearance as a witness, Catlett claimed, ''I couldn't tell you, I don't know what month it was at all'' that he had become aware of the Union's organizing campaign. Nevertheless, despite Catlett's lack of candor, the testimony of Bunn and Fink, as well as the stipulation concerning receipt of a copy of the petition, establish that Respondent had been aware of the Union's campaign at Grand Rapids before Monday, October 31, 1994.

The second occurrence on that Friday took place at Grand Rapids. During the preceding month there had been an inspection there of plastic packaging bags and of the process used to seal them. The inspector found no problem with the bags or the process. But, she said that Respondent needed to post a material safety data sheet (MSDS) describing the chemicals and products being used. Prior to October 28 Bunn had been attempting to obtain one from the bags' supplier. A copy finally was received at Grand Rapids on that Friday. Regina Saric disseminated copies of it to some of the employees. Unable to understand what the MSDS meant, some employees became concerned that the plant might be closed due to the presence of hazardous materials.

Those employee concerns were voiced to Fink and Catlett when they arrived for work at Grand Rapids on Monday, October 31, 1994. In turn, the two line leaders conveyed those concerns to Bunn when she arrived for work that morning. When she learned that the employees had become upset because Regina Saric had publicized the MSDS, Bunn became upset and confronted Saric, accusing the latter of having exercised poor judgment which had caused employees to become apprehensive ''for no reason,'' since the MSDS was not adverse to Respondent and, in any event, no work was being done on the project at that time.

Regina Saric then became upset at Bunn's attitude and words. She spoke to her husband, Edward, saying that, ''Bunn was kind of putting a lot of pressure on her asking her about things and kind of harassing her, and she said she can't take that yelling and screaming, that she will probably have to go home or let her cool down a little bit,'' he testified. According to Edward Saric, he persuaded his wife to return to work, to ''see what will happen later,'' but she came back to him shortly and said that she was leaving because she had ''a big headache'' caused by Bunn's ongoing ''harassment'' concerning the MSDS.

With respect to that testimony, Bunn testified that, following her above-described conversation, she did not ''believe'' that she had any subsequent conversation with Regina Saric. However, Bunn agreed that Ms. Saric ''might have been working on the computer for a few minutes'' before she left Respondent's facility for the day. Interestingly, though it is undisputed that she ordinarily performed payroll work on Mondays, Respondent never contended—nor presented evidence which might support a contention—that Regina Saric had left any unperformed work when she departed the facility that day.

Concerning her departure, Respondent advanced testimony which was inconsistent. Initially, Bunn testified that, ''Out of the corner of my eye, because I was on the phone,'' she had observed Regina Saric ''gather[ ] up her things,'' and Bunn described those ''things'' specifically as, ''A purse, jacket—that was about it. She put her name tag in the bottom of the file drawer—in the file drawer—and left.'' In other words, based on Bunn's initial description, Ms. Saric took no more with her than items which she ordinarily might take when leaving work for the day.

When he testified about Ms. Saric's departure on October 31, 1994, Catlett expanded on Bunn's initial description of

items taken by Saric: ''She walked by with a box of her belongings and went out the front door.'' Indeed, later in her testimony, Bunn indulged in a bit of expansion, of her initial description, with respect to what Saric had taken with her that day. For, Bunn testified that, when she later had been in the area of Regina Saric's work station, she ''again noticed that Gina's stuff was gone'' from her desk. That was not the only internal inconsistency in Respondent's testimony concerning what Saric had taken with her when she had left that day.

Pressed during cross-examination about the ''box'' which he originally claimed that Saric had been carrying when she had left, Catlett backpedaled: ''She had her back to me, but I could see she was carrying something.'' He then conceded that, ''No, actually not'' did he have any idea of what Ms. Saric had been carrying when she had departed Respondent's facility on Monday, October 31, 1994. But, given that concession, Catlett did not explain why he had initially claimed that she had ''walked by with a box of her belongings[.]'' Instead, Catlett attempted to resurrect his situation, claiming that when he later went back to Saric's work station, ''her personal things off the desk were gone. Her purse was gone,'' and ''I believe the only thing personal that she left there was her plant[.]'' Yet, that description is contradicted by Bunn's initial specific enumeration, quoted above, of Regina Saric having taken only her ''purse, jacket—that was about it.'' In the end, Bunn's and Catlett's testimony about this subject appeared to have been more intended to support Respondent's contention that Regina Saric had quit, than to truthfully describe what had taken place when she left work that day.

Bunn testified that, prior to October 31, 1994, Regina, as well as Edward, Saric had expressed dissatisfaction with working for Respondent and, moreover, that Regina Saric had mentioned looking for another job. As a result, testified Bunn, when Saric left abruptly that Monday, ''I interpreted that as abandoning her position, she walked out. She had had enough.'' That supposed conclusion of Bunn was refuted by certain testimony given by Edward Saric. After his wife had left, he testified that he ran into Bunn and she asked ''where is Gina, my wife, and I said, well, she had a headache. She had to go home and she just—Lorraine said 'Well, that's an unexcused absence. That's good.''' Bunn never denied that testimony by Edward Saric— did not deny that she had been told that Ms. Saric had gone home because of a headache. Surely, such an explanation tends to refute any asserted conclusion that Regina Saric had left because she was quitting.

It is settled that testimony is not required to be blindly accepted merely because it is not contradicted. See, e.g., *NLRB v. Howell Chevrolet Co*., 204 F.2d 79, 86 (9th Cir. 1953), affd. 346 U.S. 482 (1953); *Woods v. United States*, 724 F.2d 1444, 1452 (9th Cir. 1984). Still, where testimony is uncontradicted, though the opportunity to do so existed, that very absence of contradiction distinguishes such testimony from contested testimony. ''Although the Board may dismiss or disregard uncontroverted testimony, it may not do so without a detailed explanation.'' (Citation omitted.) *Missouri Portland Cement Co. v. NLRB*, 965 F.2d 217, 222 (7th Cir. 1992). Moreover, when the absence of contradiction is based on a statement, or statements, attributed to a respondent's supervisor or agent, then that absence can provide a basis for ''draw[ing] an inference that [the supervisor's or agent's] testimony would have been adverse to the Respondent.'' (Citation omitted.) *Paramount Poultry*, 294 NLRB 867, 868 fn. 9 (1989), and cases cited therein. To be sure, Bunn had ceased working for Respondent on July 11, 1995, before she became a witness in this proceeding. Nonetheless, she was called as a witness for Respondent and, when testifying, displayed an obvious alignment with Respondent and its positions in this proceeding. See general discussion of partiality and impartiality in *Davis v. Alaska*, 415 U.S. 308, 316–318 (1974), and, more particularly, under the Federal Rules of Evidence in *United States v. Abel*, 469 U.S. 45, 49–53 (1984).

Although Bunn did not deny having participated in the above-described conversation with Edward Saric, she did testify that, after Regina Saric had left on October 31, 1994, ''I ran into Russ Catlett, and I said . . . that I needed to talk to Ed Saric, could he please find him and send him up to my office.'' Catlett agreed that Bunn had ''asked me to have Ed come to the office, Mr. Saric.'' But, neither witness advanced an estimation of how much time had elapsed between Regina Saric's departure and Bunn's request that Catlett tell Edward Saric to report to the office. In contrast, Edward Saric testified that, having spoken with Bunn about the reason for his wife's departure, ''After maybe ten, fifteen minutes Russ Catlett came to get me because Lorraine wanted to talk to me.'' Certainly, nothing inherent in those descriptions necessarily precludes existence of a brief exchange between Bunn and Edward Saric between the time that Ms. Saric left and the time when Bunn asked Catlett to summon Edward Saric to the office.

Edward Saric did report to Bunn's office. Bunn acknowledged as much. Their ensuing conversation gives rise to several alleged violations of the Act. He testified that Bunn had started by asking what was going on with Saric and his wife about his ''union crap'' and, when he denied knowing anything about it, that Bunn had retorted that she knew the Sarics were the organizers and would not ''tolerate'' such activities. The complaint alleges that those remarks violated Section 8(a)(1) of the Act.

Bunn testified that she ''would never say'' that she would not ''tolerate this Union crap,'' pointing out that she, her husband and her father had been union members and, further, that she knew that managers were not allowed to say such things to employees. Still, she did not deny having asked Saric about his and his wife's involvement with the Union. To the contrary, Bunn conceded that she had asked him about ''the rumor that you and Gina are involved in the Union[.]'' She testified that she and he had discussed unions and the union sympathies of each of them in the past. As Saric pointed out when testifying, however, there is no evidence that those discussions had ever pertained to specific activities concerning a union.

According to Bunn, by way of explanation for her question to Saric, ''I wanted to find out where all these rumors were coming from, because I considered him part of the management team, and this seemed unlikely to me.'' Yet, Bunn never explained what she meant by ''this seemed unlikely to me.'' More significantly, in explaining why she would not have referred to the Union as ''crap'' and why she would not have said that she would not ''tolerate'' union activities by the Sarics, Bunn testified, ''I think, in some circumstances, unions are good.'' Of course, implicitly that

means that in other circumstances Bunn did not think ''unions are good.'' But, she never explained the point at which she drew her distinction. Still, it can hardly have been a circumstance favoring the Union's effort to become the representative of Respondent's employees that, regardless of what Bunn may have thought personally, the president of Respondent's corporate parent, DuRand, admittedly had become ''quite upset'' on receiving a copy of the representation petition in Case 18–RC–15673, as quoted above.

Both Edward Saric and Bunn testified that their conversation had continued. According to him, she asked for return of his building keys, saying that she was concerned about the building's safety and could not trust him anymore. Bunn acknowledged that she had asked for Saric's keys. She testified, as her reason for the request, that she had said, ''Ed, I am worried about the safety of the plant,'' that ''Regina was very angry and left angry,'' or, at least, ''had appeared angry to me.'' Bunn never testified that she had explained to Edward Saric what connection she drew between his wife being angry when she left the facility and the asserted need for him to surrender his building keys. At no point when testifying did Bunn even suggest that she had suspected one or the other of the Sarics of possible sabotage during nonwork hours—that one or the other, possibly both, might return to the facility and damage Respondent's property. Indeed, such a suspicion would be completely illogical in light of the undisputed testimony that she had been told that Regina Saric had gone home with a headache. Instead, it seemed that Bunn's true motivation for requesting that Saric surrender his building keys had been located elsewhere.

When he testified, Edward Saric impressed me as a somewhat excitable individual. By October 31, 1994, Bunn had to be aware that he became concerned whenever it appeared to him that even a portion of his duties was being reassigned. For, it is uncontroverted that Saric had complained whenever it seemed that someone else—for example, Catlett—started performing work that Saric had been performing. Thus, though Bunn testified that she had assured Saric surrender of the keys ''would in no way change his job,'' and that he ''would have access to all of the keys'' and plant areas during working hours—that ''your job is not going to change''—she had to know that he would become concerned about the affect on his job of having to relinquish the keys. In fact, he testified that his ''brain blocked out'' on hearing that request and ''just got angry and mad because I didn't understand why this was going on now.'' So, he said that he quit. And when Bunn produced a blank ''TERMINATION REQUEST'' form, Saric completed it and signed it.

When he left Bunn's office, Saric told assembler/packager Thomas E. Manthey that ''Gina had to leave'' and that he (Edward Saric) had quit. Still, there seems little doubt that, at that time, Saric believed that Bunn had forced him to quit and that, in effect, he had been fired. For, when he encountered Catlett, after having left Bunn's office, Catlett testified that Saric ''said that he had been fired.'' Indeed, regardless of Manthey's testimony about what had been said to him by Edward Saric, it seems clear that Manthey understood from Saric's words and attitude that the latter believed that he had been fired. That is best illustrated by the fact that both Manthey and Bunn testified that the former had gone to the latter to discuss what had taken place and, at the outset of their conversation, Manthey accused Bunn of having fired the Sarics.

As to that conversation, Manthey testified that when he had said that he heard that ''Ed and Gina were fired,'' Bunn had ''nodded her head indicating to me yes, they were gone.'' However, Bunn denied having nodded in the affirmative when Manthey said that she had fired the Sarics. She testified that, instead, she had said, ''Ed and Gina were not fired,'' but ''It was my understanding that they have quit.''

In addition, Bunn testified that Catlett had reported that Edward Saric had been telling other employees that he and his wife had been fired. To ''make sure that everybody understood what was going on,'' testified Bunn, she went to the assembly and packaging floor and held a meeting with the employees. During it, she recited what had occurred in connection with the MSDSs, denied that she had fired the Sarics, and said that Edward had quit and that Regina had walked out.

Bunn further testified that, ''I also had inquiries that day from employees about when the [Sarics'] jobs would be posted.'' So, she drafted job descriptions, obtained approval for them from Maher and Stock, and posted them the following day, November 1, 1994.

One final sequence of events should be considered in connection with the Sarics' departure from Respondent's employment. The complaint alleges that, beginning on November 1, 1994, Catlett threatened that DuRand hated unions and would close the Grand Rapids plant if employees there selected the Union as their bargaining representative. DuRand denied ever having said such things; Catlett denied ever having heard DuRand say them. Yet, when asked about having made such statements to Respondent's employees, Catlett answered ambiguously. He denied flatly having ever threatened ''an employee at the plant with adverse action if they supported the Union[.]'' However, he never denied having threatened specifically that the plant would close if the Union was selected by the employees. Further, when he was asked if he had threatened that wages would go down if employees voted in a union, Catlett responded:

> I may have speculated that, regardless, because of our lay off and the number of people employed at the time, that win, lose, or draw—meaning whether the Union got in or not—that the plant could be closed any time, because of this hemorrhaging that we were aware of.

In fact, four employees described closure threats by Catlett. LaVonne MacAdams, a machine operator line leader,[7] testified that, while the employees had been working, Catlett ''said that the plant could close if we get the [U]nion in.'' Keith Hawkinson testified that on more than one occasion, in the presence of Manthey and Paul Thompson, Catlett had asserted ''if we want union that the company would shut down,'' but that the employees always had disagreed with that assertion. Assembler Michelle Bibeau testified that, on one occasion during late October 1994, in the presence of 35 to 40 employees, Catlett had said loudly that, ''John DuRand hates unions so bad that if one gets in the plant doors will be closed for good.''

[7] To be distinguished from the supervisory position of line lead.

Manthey was the fourth employee who testified about a closure remark by Catlett. Like Bibeau, he testified to having been told by Catlett, ''John DuRand hates unions and I know that if he [sic] puts one in here they will close the plant.'' Manthey further testified that he overheard Catlett making that identical statement to two other employees. What makes Manthey's accounts of Catlett's statements significant to the Sarics' departure is that, in addition, Manthey testified that, ''within a couple days after Ms. Saric left,'' Catlett had said ''that's what you get when you mess with the [U]nion. You end up like Gina.''

In light of what has been said above, it requires no prolonged discussion to conclude that Bunn had made unlawful statements—that she knew the Sarics were the Union's organizers and would not ''tolerate'' such activity—and, as well, that Catlett had made unlawful statements—that DuRand hated unions and that the plant would close if the Union became the employees' collective-bargaining agent—alleged in the complaint. Catlett never actually denied having made the threats described by MacAdams, Hawkinson, Bibeau, and Manthey. To the contrary, in his above-quoted testimony, Catlett admitted having discussed ''that the plant could be closed'' with employees. He claimed that he had done so in the context of money being lost operating it. But, as pointed out above, Catlett did not appear to be testifying candidly and I do not regard as reliable his denials about the context of his closure statements.

As to Bunn's alleged unlawful threats to Edward Saric on October 31, 1994—about knowing that he and his wife were organizing and that she would not tolerate it—certain factors serve to refute her denials regarding those statements and, moreover, to confirm Edward Saric's testimony that she had made those statements to him. First, as concluded in subsection B, above, Bunn was not generally a credible witness.

Second, she admitted that on the immediately preceding workday—Friday, October 28, 1994—she had heard from Catlett and Fink that the Sarics ''were signing up people'' for the Union. Accordingly, there had been an event which naturally would have led her to assert to Edward Saric that she knew that he and his wife were organizing for the Union.

Third, not only did Bunn concede that she had raised the issue of the Union's campaign during her October 31 conversation with Edward Saric, but Respondent's witnesses agreed that she also had raised it with Catlett and Fink, as well, during that same time period. Bunn instructed the two line leaders not to become involved in discussions with employees about the Union's campaign, in view of Catlett and Fink's supervisory status. Obviously, mere discussion of the subject represents a lesser form of involvement than ''signing up people'' for the Union, which Bunn acknowledged that Catlett and Fink had reported the Sarics to have been doing. The Sarics were regarded by Respondent's management to be key personnel, if not supervisors. In fact, as concluded in subsection B, above, neither Edward nor Regina Saric had been statutory supervisors while employed by Respondent. Yet, since Bunn appeared to regard the Sarics in the same category as Catlett and Fink, and inasmuch as she instructed the latter two individuals not to become involved with employees in discussing the Union, it would have been natural for her to similarly instruct the Sarics to cease engaging in the even more overt activity of signing up people for the Union.[8]

Fourth, Bunn admitted that, on October 31, 1994, she had raised with Edward Saric ''the rumors that [he] and Gina were involved in the Union[.]'' Consequently, Bunn's testimony corroborates that of Edward Saric to the extent that Bunn had initiated discussion of the Union with him during their conversation on that day.

Fifth, Bunn testified that while she was not adverse to the concept of unionization, given her personal and family background, she acknowledged regarding unions to be good only ''in some circumstances[.]'' As discussed above, she never explained the basis for her distinction as to when unionization would and would not be good. Nor did she testify that the situation of Respondent and its employees were such that the Grand Rapids facility presented one circumstance where unionization would be ''good.''

Sixth, founder DuRand admitted had become ''quite upset'' when a copy of the representation petition in Case 18–RC–15673 had been received on the same day as Bunn, along with Catlett and Fink, had been at St. Paul headquarters. Moreover, Maher met regularly with Grand Rapids employees during November and early December 1994 and, during those meetings, attempted to persuade them that unionization was not the best course for them to follow, as discussed in subsection D, below. Nothing necessarily illegal with such employer appeals to employees. Still, such actions do show that, regardless of Bunn's personal view on unionization, her management superior did not regard representation of Grand Rapids employees to be a ''good'' thing. Of course, it was higher management who determined whether or not Bunn continued to serve as plant manager at that plant.

Finally, Bunn admittedly was upset during the morning of October 31, 1994, as a result of employee reaction to the MSDS dissemination of the preceding Friday, as described above. Accordingly, it would not be illogical for her agitation concerning that event to be reflected in all conversations that morning, even one not pertaining to the MSDSs. In fact, it would not have been illogical for her agitation to impair her judgment concerning what she should and should not say to employees. It had been Edward Saric's wife who had publicized the MSDS. Regardless of the propriety of that publication, it would not have been illogical for Bunn to be especially agitated when talking to the husband of the very employee who had created a problem for Bunn.

In light of the foregoing considerations, regardless of her personal feelings about unions, it is not beyond the realm of likelihood that Bunn would have used such terms as ''union crap'' and ''tolerate'' when speaking to Edward Saric on October 31, 1994. Even assuming arguendo that she had not intended to coerce him by her remarks, that would not be a valid defense to statements which violated Section 8(a)(1) of the Act. For, such violations do not ''turn on the employer's motive, or on actual effect. Rather, the test is whether the

[8] It matters not whether Bunn, and Respondent's officials, genuinely believed that the Sarics were statutory supervisors. If so, that belief had been a mistaken one. A mistaken belief that an employee to whom unlawful statements and conduct are directed is a statutory supervisor ''affords Respondent no defense'' under the Act. *Geary Ford*, 261 NLRB 1149, 1151–1152 (1982); *NLRB v. Merchants Police, Inc.*, 313 F2d 310, 312–313 (7th Cir.).

employer's statements may reasonably be said to have tended to interfere with employees' exercise of their Section 7 rights.'' (Footnote omitted.) *Lee Lumber & Building Material*, 306 NLRB 408, 409 (1992). In fact, however, it appeared to me that Bunn intended fully to coerce Edward Saric by her statements to him that day.

Edward Saric appeared to be testifying candidly when describing Bunn's remarks to him: that she knew he and his wife were organizing for the Union and that she would not tolerate such activity. Such statements are consistent with the circumstances under which that conversation between them had been conducted, for the reasons enumerated above. Bunn never explained to Saric that the source of her knowledge about the Sarics' protected activity had been reports of Catlett and Fink. What Saric did know, during that conversation, is that he had signed a card authorizing the Union to represent him and, further, that he had done so in the presence of other employees. Viewed from his perspective that day, it appeared that Bunn had some source of information about his union sympathies and support.

To be sure, that source of information could not have seemed to Edward Saric to be completely accurate. There is no evidence that he or his wife had actually been organizers for the Union, as Bunn was accusing them of doing. Still, her accusation contained a sufficient kernel of truth, that he had been supporting the Union, for him to conclude logically that Respondent had been, or was beginning to, ''monitor[ ] the degree and extent of . . . organizing activities and efforts.'' (Footnote omitted.) *United Charter Service*, 306 NLRB 150, 151 (1992). In consequence, by warning Saric that she knew that he and his wife were organizers for the Union, Bunn naturally created an impression of surveillance of union activities at Respondent. Beyond that, a supervisor's statement that union activities in general, or union activities by particular employees, will not be tolerated is inherently coercive. Therefore, when Bunn made those statements to Edward Saric on October 31, 1994, Respondent violated Section 8(a)(1) of the Act.

Turning to the Sarics' departure from Respondent's employment, the credible evidence leaves little room for a conclusion other than that Regina Saric had been fired. To be sure, she abruptly left work midmorning on October 31, 1994. Nevertheless, it is undisputed that Bunn had been informed by Edward Saric that his wife ''had a headache'' and ''had to go home[.]'' Obviously, the knowledge imparted to Bunn by Edward Saric's uncontroverted statements obliterates any basis for Bunn's assertion of belief that Regina Saric had quit. In addition, Edward Saric's undenied explanation to Bunn eliminates, as support for a purported belief that Ms. Saric had quit, whatever prior dissatisfaction Regina Saric had expressed about her job and, also, whatever statements she had made concerning seeking employment elsewhere. Indeed, Bunn's and Catlett's contradictory and inconsistent testimony about what items Saric supposedly taken with her that day, as described above, serves only to reinforce a conclusion that Respondent was searching for some valid indicator to support its pretextual claim that Regina Saric had quit.

Beyond that, there is no basis for any contention that Respondent had validly discharged Regina Saric for ''an unexcused absence,'' the phrase mentioned by Bunn to Edward Saric on October 31, 1994. Nor is there any basis for inferring that she had been discharged for leaving work without securing prior permission to do so. While Bunn occasionally appeared to be implying as much, or at least that Saric's conduct had constituted misconduct, Respondent never actually took the ultimate step of arguing that it had terminated Regina Saric for walking off the job. And there has been no showing that leaving work midday without permission had constituted so serious an offense that, under Respondent's disciplinary procedures, discharge was warranted. Nor is there evidence of prior discipline of Regina Saric which might have supplied the basis for a contention that her midday departure, without obtaining prior permission to leave, constituted the ultimate act of misconduct for which discharge was warranted.

Nonetheless, the record does support the conclusion that, in reality, Respondent had discharged Regina Saric on October 31, 1994. Despite what she had been told earlier by Saric's husband, Bunn admitted having told employees that day that Regina Saric had ''walked out'' and, moreover, that Bunn had prepared a job description for Ms. Saric's job. Furthermore, I credit Manthey's testimony that, when he had spoken with Bunn on October 31, 1994, and had mentioned to her that ''Gina was fired,'' Bunn had nodded affirmatively in response. Finally, in the course of telling some employees about DuRand's hatred of unions, Catlett at least once warned that, ''You end up like Gina'' when ''you mess with the [U]nion.'' Those hardly are words which portray an employee's resignation.

True, Catlett had not been involved directly in the sequence of events involving Regina Saric's departure from work on October 31, 1994. Still, both he and Bunn acknowledged that her departure had been discussed by them on the day that it had occurred. As a result, there is some basis for concluding that Catlett did possess knowledge regarding what had happened and the reason for Regina Saric's elimination from Respondent's payroll. In sum, as well as being an unlawful threat of adverse consequences for employees who become involved in union activities, Catlett's statement further evidences that, in fact, Respondent had actually discharged Regina Saric.

Catlett's statement also is evidence of unlawful motivation for that discharge. It is not the only evidence of unlawful motivation. The events of October 31, 1994, occurred on the workday immediately following the one during which Respondent had learned about the representation petition which ''really upset'' DuRand. It also had been on that day that Bunn had been informed that Regina Saric was one of two organizers for the Union. That had been the very activity which Bunn asserted that she would not ''tolerate.'' In the totality of the foregoing circumstances, I conclude that a preponderance of the credible evidence establishes that Respondent did take advantage of Saric's abrupt departure to classify her as a resignation and to then discharge her because of, at least, its suspicion that Ms. Saric had been supporting the Union.[9]

[9] Contrary to Respondent's seeming assertion to the contrary, ''the Act is violated if an employer acts against the employees in the belief that they have engaged in protected activities[.]'' *Henning & Cheadle, Inc. v. NLRB*, 522 F.2d 1050, 1052 (7th Cir. 1975). Accord: *NLRB v. Ritchie Mfg., Co.*, 354 F.2d 90, 98 (8th Cir. 1965).

Furthermore, Catlett's warning that ''you end up like Gina'' whenever ''you mess with the [U]nion'' constituted a violation of Section 8(a)(1) of the Act. Coming in the wake of Regina Saric's separation of employment with Respondent, Catlett's statement was an obvious threat of adverse consequences, specifically of discharge, for supporting and for engaging in activities on behalf of the Union. Moreover, Respondent also violated Section 8(a)(1) of the Act as a result of his threats that DuRand hated unions and would close the Grand Rapids plant if employees working there selected the Union as their bargaining agent.

Respondent attempts to portray Catlett's closure statements as no more than lawful predictions based on Respondent's financial difficulties. That argument, of course, is consistent with his above-quoted somewhat ambiguous account of what he had said to employees about closure. But, as stated above, Catlett was not a credible witness and I do not credit such testimony by him. The employee-descriptions of what he had said to them leaves no doubt that he had been saying that closure would result from selection of the Union as the employees' bargaining agent.

The unlawfulness of such a threat is not nullified by the testimony that DuRand never had stated that he hated unions or would close if the employees chose representation. Nor is Catlett's threat obviated by Respondent's evidence that it would have cost more to close the Grand Rapids facility than to continue operating it, even if the employees there became represented. There is no evidence that employees working there had been aware of any of the foregoing asserted facts to which Respondent now points. Indeed, in an era where business bankruptcies are not all that uncommon, employees would not necessarily believe it to be implausible, as an objective matter, that their employer might be willing to incur significant economic disadvantage if it could avoid having to deal with a union. Therefore, I conclude that credible evidence supports the allegation that Catlett did threaten that DuRand hated unions and would close the Grand Rapids facility if employees working there selected the Union as their bargaining agent and, in consequence, that Respondent violated Section 8(a)(1) of the Act.

This leaves for consideration, in this subsection, Edward Saric's resignation which is alleged to have been a constructive discharge. At the outset, Respondent argues that no such conclusion is possible in the circumstances presented here, for the only change which occurred is that Saric had been asked to surrender his keys to the Grand Rapids facility. That does not create a situation ''so difficult or unpleasant,'' contends Respondent, that it would naturally force an employee to resign or, concomitantly, that an employer could fairly anticipate that it would naturally force an employee to resign, especially given Bunn's assurance to Saric that his duties would not change. In short, argues Respondent, the doctrine of constructive discharge is not applicable to the situation presented by Saric's resignation.

In support of that argument, Respondent cites, inter alia, *Crystal Princeton Refining Co*., 222 NLRB 1068 (1976). It is accurate that the Board held in that case, as well as in more recent cases, e.g., *Aero Industries*, 314 NLRB 741, 742 (1994), that a requirement of ''working conditions so difficult or unpleasant'' must be present for the constructive discharge doctrine to be applied. Yet, such statements must be regarded as less than complete descriptions of the constructive discharge doctrine. For, the Board has also pointed out, ''We do not believe, however, that the Crystal Princeton test can be read so narrowly as to apply only when an employer has changed an employee's working conditions.'' (Footnote omitted.) *American Licorice Co*., 299 NLRB 145, 148 (1990).

Nor is the doctrine of constructive discharge restricted to situations where the substantive content of employees' work is involved, although those situations present what may be regarded as ''classic'' ones. That doctrine also applies to an alternative situation: when an employee is ''offered a Hobson's choice'' between continued employment but only if that employee abandons ''right guaranteed [employees] under the Act.'' (Footnote omitted.) *Borden, Inc*., 308 NLRB 113, 115 (1992). Accord: *Remodeling by Oltmanns, Inc*., 263 NLRB 1152, 1162 (1982), enfd. 719 F.2d 1420 (8th Cir. 1983).

To be sure, the latter situation usually has occurred whenever employees are allowed to continue working only if they accept unlawfully formulated and implemented terms and conditions of employment or, beyond that, are compelled by their employers to abandon existing union representation. Indeed, the Board has ''long held that there is no constructive discharge where an employee quits in protest against an unfair labor practice.'' *Kogy's Inc*., 272 NLRB 202, 202 (1984). More than an unfair labor practice is involved, however, whenever an employee is prohibited or restrained from continuing to engage in an ongoing organizing campaign on behalf of a union. Such an employee is being compelled to cease attempting to become represented. There is no difference, as a practical matter, from that employee's situation and the situation of an employee compelled to abandon representation which has existed historically. In both situations, the employee is compelled to abandon the possibility of future representation—the one because he/she is disallowed from retaining existing representation and the other because he/she is prohibited or restrained from exercising the statutory right to become represented.

The latter was the essence of the message communicated to Edward Saric by Bunn. She warned him that she knew he and his wife were engaging in organizing activities and that she did not intend to ''tolerate'' such activities. Implicit in her ''tolerate'' statement was the threat that she would take action against the Sarics for continuing to engage in organizing activities. Of course, such activities are protected by Section 7 of the Act. Consequently, Bunn was demanding that Saric and his wife abandon future organizing activities or suffer adverse consequences for continuing to engage in that activity. Of course, if the Sarics did abandon organizing activity, that would diminish the possibility of their becoming represented.

Bunn reinforced that implicit threat by an accompanying explicit demonstration of the power which she could exercise over Edward Saric's employment situation. She asked him for the keys which he used to gain access to Respondent's Grand Rapids facility to perform his assigned duties. True, she accompanied that request with the explanation that surrender of the keys was needed because of her purported concern about security and safety of the facility. However, that purported concern was not advanced convincingly by Bunn when she testified and, further, it could have made no sense to Edward Saric when she expressed it to him on October

31, 1994. For, Bunn's expressed concern about building safety and security had been bottomed exclusively on the circumstances of Regina Saric's departure from work that day. At no point—neither when talking to Edward Saric that day, nor when testifying during the instant proceeding—did Bunn explain exactly how that departure somehow posed a threat to safety and security of the Grand Rapids facility.

As pointed out above, at no point did Bunn actually claim that she had believed that the Sarics—or, particularly, Regina Saric—would use the keys to gain off-hours access to the Grand Rapids facility and damage it in some way. Nor is there evidence which would provide a basis for inferring that, in the circumstances, a supervisor legitimately could fear that such danger existed. After all, Regina Saric merely had left work early carrying her purse and jacket, according to Bunn's initial description—the only specific description of the items taken with her by Saric. Surely, it cannot be inferred or concluded that such actions inherently give rise to employer fears about plant safety and security.

When she left, Regina Saric had been upset and that might have been perceived by Bunn as anger. Even so, the fact that an employee abruptly departs her job in anger, standing alone, does not naturally give rise to a legitimate concern about retaliation. Even less so does that departure give rise to such a concern where, as here, the employer is told specifically that the departing employee went home because of a headache. Nothing inherent in that explanation would appear to give rise to a legitimate conclusion that the departing employee might return and damage her employer's facility. To the contrary, the explanation about a headache might well explain why the departing employee appeared angry. In any event, nothing said by Edward Saric to Bunn would naturally lead the latter to believe other than that Regina Saric intended to return for work on the following day.

Obviously, when speaking with Bunn during the meeting in her office, Edward Saric had been aware of what he had explained to Bunn about the reason for his wife's earlier departure from work. Accordingly, it could not have made sense to an employee in his position that a supervisor would become so concerned about facility safety and security, as a result of the abrupt departure with a headache of that employee's wife, that the employee would be asked to relinquish his keys. The very illogic of the circumstances of Bunn's request for the keys, against a background of being told that she was aware of statutorily protected activities which she would not ''tolerate,'' naturally would cause an employee to become concerned about his prospects for continued employment. If nothing else, the situation certainly would lead that employee to conclude that he had better cease engaging in activity protected by the Act if he wanted to continue being employed.

True, Bunn also said that Saric's duties would not change and that he would have access to the keys to perform his duties during working hours. By that point, however, Saric can hardly be faulted for disbelieving such assurances by Bunn. After all, she had just advanced a patently specious reason for requesting surrender of his keys, which had followed an unlawful prohibition of his statutory right to continue engaging in activities to secure representation. In such circumstances, it surely was not illogical for Edward Saric to have disbelieved such an assurance by Bunn—to have concluded that more of his employment situation was about to likewise change.

In these circumstances, it would not be illogical for an employee to believe that his termination was imminent because he had engaged in statutorily protected activities. Nor, would it be illogical for him to believe that he would have to surrender his statutory right to engage in union activity if he wanted to continue working for Respondent. Both situations are encompassed by the second, or alternative, theory of constructive discharge addressed in *Borden's, Inc*., supra. In the past, Respondent had attempted to discourage the Sarics from discontinuing employment with it, as evidenced by the trip to St. Paul which it had paid for them to make during the week prior to that of October 31, 1994. But on that date, after pro forma inquiry as to whether Edward Saric truly wanted to quit, Bunn readily accepted his resignation and promptly produced a document which he could fill out to finalize that resignation.

Given the totality of the foregoing circumstances—particularly Bunn's statements to the assembled employees during the afternoon of October 31, 1994, and her statements to inquiring employees about posting job descriptions so that applications could be filed for the Sarics' positions—the fact that neither Saric reported for work on November 1 hardly serves to negate conclusions that Regina had been discharged and Edward had been constructively discharged. Nor are those conclusions negated by the fact that neither Regina nor Edward Saric chose to take advantage of the, in effect, internal disputes resolution procedure provided in Respondent's employee handbook.

From their perspective, those two employees could hardly have placed much trust in the prospective fairness of Respondent's considerations under that procedure. Accordingly, it cannot be persuasively maintained that their unwillingness to submit to Respondent's internal disputes resolution procedure somehow evidences a concession by them that it had been strictly their own desire, rather than that of Respondent, which led to their separation from employment with Respondent. In any event, this proceeding has been initiated by the General Counsel's allegations that Respondent engaged in unfair labor practices directed at the Sarics. The Board's power to prevent unfair labor practices is not, under Section 10(a) of the Act, is not ''affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise,'' save for specified procedures not applicable to an employer's internal disputes resolution procedures.

Therefore, I conclude that a preponderance of the credible evidence establishes that Respondent discharged Regina Saric and constructively discharged Edward Saric on October 31, 1994. Those were the only two employees, so far as the evidence reveals, that Respondent had known on that date to be supporters of the Union. Respondent had learned only recently—on Friday, October 28, 1994—that the Union had filed a representation petition to represent Grand Rapids employees. Not only did Respondent engage in other unfair labor practices, as discussed above and in succeeding subsections, to prevent selection of the Union as the bargaining agent of those employees, but Catlett pointed specifically to Regina Saric's discharge as illustrating what happens to union supporters. Respondent's witnesses were not credible in their efforts to explain what happened to the Sarics on Oc-

tober 31, 1994. Accordingly, Respondent has failed to advance credible legitimate reasons for the discharge of the one and for the constructive discharge of the other. In the totality of the circumstances, I conclude that those discharges violated Section 8(a)(3) and (1) of the Act.

D. *Statements Made During, and in Conjunction with, Meetings with Employees*

As set forth in subsection A, above, after becoming Respondent's president and chief operating officer, Maher, made periodic trips to Grand Rapids. On those occasions he met with employees working at Respondent's facility there. Initially, he met with all employees in a single group. Later, he began meeting with them in several smaller groups. The complaint alleges that during meetings after November 1, 1994, Maher unlawfully had told employees that he would like to see wage increases and other employment improvements but nothing could happen so long as the union situation existed, had encouraged employees to abandon the Union in favor of an employee committee, had solicited employees' grievances and promised to remedy them, and had coercively interrogated employees about their support for the Union.

As to the first of those allegations, assembler/packager Manthey testified that, during a late November small group meeting, Maher had said, ''we'd like to do everything we can for you but we can't because of this union thing. We'd like to see you all get raises but it's just not feasible now.'' Were those statements made by Maher, they would violate Section 8(a)(1) of the Act. For, the Board has held that statements which place the onus for denying consideration of raises and other benefit improvements on a union, and on its organizing campaign, inherently discourage employees' union support. *Trover Clinic*, 280 NLRB 6 fn. 1 (1982), and cases cited therein. Moreover, when made during a preelection period, such statements inherently undermine employee confidence in the representation process created by the Act to guarantee employees a free choice concerning representation.

Manthey was the lone employee who testified to such a statement by Maher. The absence of corroboration for Manthey's testimony is, of course, ''a factor in determining whether the General Counsel has established by a preponderance of the evidence that a violation has occurred.'' *C & S Distributors, Inc*., 321 NLRB 404 fn. 2 (1996). Nonetheless, a failure to supply corroboration is not, standing alone, necessarily fatal. *Laborers Local 190 (ACMAT Corp.)*, 306 NLRB 93 fn. 2 (1992).

By late November 1994, Maher had conducted enough small group meetings that an employee might naturally have difficulty identifying who else had been present at any particular meeting. When testifying, Manthey appeared to be attempting to do so honestly. Most significant, however, is the fact that Maher never denied with specificity having uttered the above-quoted threat, attributed to him by Manthey. The absence of such a denial, as discussed in subsection C, above, is a factor which, objectively, supports the reliability of Manthey's description of Maher's words.

The fact that Maher made such a statement on but a single occasion is some evidence that he did not do so pursuant to a plan to place on the Union and the representation process the onus for lack of consideration of raises and employment improvements. Still, lack of intent is not a factor which inherently raises suspicion about the credibility of Manthey's description. After all, during the preelection period, Maher had presided over a number of small group meetings. At all—or, at least, most—he had entertained employees' questions and had tried to answer them. It is not at all inconceivable that one such question, during a late November small group meeting, would have sparked the response described by Manthey. Of course, as pointed out above, such a response's unlawfulness is not mitigated or erased by a lack of intent by Maher to violate the Act or to interfere with employee free choice. *Lee Lumber & Building Material*, supra.

To be sure, since September Maher had been telling employees that Respondent's adverse financial condition, as illustrated by graphic and charts which he displayed, precluded it from granting wage increases and benefit improvements. Nonetheless, communication of that message would not necessarily lead employees in late November to dismiss Maher's threat as an empty one—one which pertained to improvements which could not be effected in any event, because Respondent had been a money-losing operation. For, his threat informs employees of an additional factor in Respondent's consideration of whether to grant economic improvements, such as raises—a factor on which Respondent intended to rely even should the economic picture brighten. Moreover, based on Maher's statements, it was a factor on which Respondent would rely to deny improvements even when considering employment terms and conditions which did not involve expenditure of money.

In sum, I conclude that credible evidence establishes that Maher did tell employees, during a late November 1994 small group meeting, that while Respondent would like to see employees receive wage increases and other employment improvements, that was not feasible because of the Union's presence and campaign. Those statements naturally interfere with, coerce, and restrain employee exercise of the statutory right to participate in the Act's process for deciding whether to become represented and, also, interfere with, coerce, and restrain employee support for representation by a labor organization. Therefore, as a result of Maher's statements, Respondent violated Section 8(a)(1) of the Act.

As to the alleged encouragement of employees to abandon the Union in favor of an employee committee, again only one employee described such a statement by Maher. That was assembler Michelle R. Bibeau. She testified that, during a November small group meeting, Maher had said ''that a union was not necessary, that if we all work together we can work out these problems,'' and that she had voiced a complaint ''about something concerning the job[.]'' According to Bibeau, Maher responded, ''Well, Michelle, would it make you happy if I put you on a committee and that way you would have a voice to solve some of these problems[?]'' She testified that she replied, ''No, I would rather go with a union.''

Maher denied having ever suggested to employees that he would form employee committees as an alternative to the Union. Still, he never denied with particularity occurrence of the above-quoted exchange with Bibeau. Moreover, Maher admitted that he ''felt [the Union] was superfluous'' and that he ''just didn't feel there was a need for it,'' inasmuch as ''we were a small organization that worked and that I was empowering the organization to work together as a team.''

Obviously, an employee committee would be one vehicle for promoting ''work[ing] together'' between Respondent and its employees. And it would be one which would render ''superfluous'' the employees' need for representation by the Union. That such a committee was being mentioned as a possible alternative to representation by the Union is implicit in the context of the statements described by Bibeau. Given Maher's above-described attitude, it would not have been illogical for him to respond to her complaint by making an ''off the cuff'' proposal that she be appointed to an employee committee to empower her with a voice in solving problems which she was raising—so that Respondent and, at least, she could ''work together as a team.''

A conclusion that Maher, in fact, did make the statement described by Bibeau tends to be reinforced by the identity of the employee to whom Maher made such a proposal. For, it is undisputed that, on another occasion, Maher had asked Bibeau why she was unhappy with her job. She replied that she had been, and was being, schooled for special education and, in due course, would try to locate ''another job more in that field[.]'' Maher then asked if she would be interested in a job with Respondent ''working one on one'' with individuals who were handicapped, even though such a job would not entail teaching. When Bibeau displayed interest in such a position, Maher promised that ''he'd check into it for'' her.

Those remarks to Bibeau by Maher are not alleged as violations of the Act. Nevertheless, they do show some special effort by Maher to single out and placate Bibeau's employment concerns. Certainly there is no evidence of similar proposals by Maher to any other employee. Respondent never disputed that Bibeau had been a known supporter of the Union. Were Respondent able to satisfy her employment concerns, through direct dealing, it might be able to persuade her to switch allegiance in the impending representation election. Maher's statements during the small group meeting, as described by Bibeau, are consistent with his undisputed remarks to her about a job more attuned to her education and, in addition, are consistent with an effort to persuade her that direct dealing, in this case as part of an employee committee, would be an effective alternative to representation by the Union.

The foregoing factors objectively tend to support Bibeau's description of that November offer by Maher. She seemed to be testifying honestly and I credit her description of what Maher had proposed during that small group meeting. There is no evidence that, prior to then, any type of employee committee had existed at Respondent. Obviously, employees' statutory right of free choice, regarding representation, is inherently interfered with whenever an employer makes a preelection proposal to create such a committee. Employees would naturally construe such an offer as one being advanced as an alternative to selecting representation by a union and, accordingly, it is a proposal which discourages employee support for representation by that union. I conclude, therefore, that Maher did make the statements attributed to him by Bibeau, that those statements did constitute an offer to form an employee committee, that in the circumstances Maher's offer implicitly held out such a committee as an alternative to representation by the Union and, in consequence, that Respondent violated Section 8(a)(1) of the Act.

Despite those violations, however, a contrary conclusion is warranted regarding the allegation that, during his meetings at Grand Rapids, Maher unlawfully solicited grievances and promised to remedy those voiced by employees. As described in subsection A, above, from the beginning of his tenure as Respondent's president and chief operating officer, Maher, had promised to listen to and address employee complaints whenever he came to Grand Rapids. Moreover, the evidence shows that during September and October 1994, before the representation petition in Case 18–RC–15673 had been filed, Maher had followed a practice of meeting with those employees and of trying to address their complaints and concerns. Employees so testified and the General Counsel concedes as much.

The General Counsel further acknowledges that the Act is not violated whenever, during a preelection period and organizing campaign, an employer continues its practice of soliciting employees' grievances and complaints. Nevertheless, points out the General Counsel, the Board has held that a violation does occur whenever such an employer ''significantly alters its past manner and methods of solicitation during the union campaign.'' (Citation omitted.) *House of Raeford Farms*, 308 NLRB 568, 569 (1992). In that connection, the General Counsel points to two such asserted changes by Maher following receipt of the first representation petition on October 28, 1994: Maher began conducting such meetings with greater frequency and, second, he began meeting with small groups of employees, rather than continuing to follow his initial practice of meeting with all Grand Rapids employees at a single sitting. However, neither distinction is so significant that, collectively, they warrant a conclusion of unlawful solicitation and promises of remedial action.

Maher explained that he had switched to small group meetings because that was less disruptive of production. While he was meeting with any given group, other employees could continue working. In contrast, when he met with all employees, no work whatsoever was being performed. While there would be an interruption of production under either alternative, since employees attending meetings were not producing, Maher's explanation is not without any logic and, more importantly, there is no evidence which even tends to contradict his explanation. Further, there is no evidence which would warrant an inference that Maher believed that employees were more susceptible to intimidation, or even persuasion, in small group meetings than in all-employee ones.

Whether assembled all together or in small groups, Respondent's employees were obliged to attend Maher's meetings, both during September and October and, as well, during November and early December 1994. That is one distinction between the situation here and that which had existed in *House of Raeford Farms*, supra.

True, during November and December, Maher added to his meetings the message that it was unnecessary to select the Union as bargaining agent of Respondent's employees. Standing alone, however, that message constitutes no more than an expression of opinion protected by Section 8(c) of the Act. ''Of course, an employer is free to express the opinion that employees would be better off without representation and to appeal for the support of its employees in a represen-

tation election.'' (Citation omitted.) *Nissan Motor Corp. in U.S.A.*, 263 NLRB 635, 640 (1980).

Nor is Respondent's continued solicitation of employee grievances and complaints tainted by the addition of that appeal. The Act does not prohibit employers from ''pointing with pride to an already implemented process as a basis for seeking support in the representation process.'' Id.

Those conclusions are not altered or changed simply because an employer chooses to more frequently conduct meetings with employees—the General Counsel's second proposed distinction. The General Counsel points to no evidence that—in meeting more frequently after October 28, 1994, than during the preceding 2 months—Respondent somehow had displayed greater receptivity to what employee were saying. Nor did it appear to be responding any differently, even marginally so, to complaints and grievances voiced during November and December meetings than had been the fact during September and October. Given those facts, there is nothing inherent in increasing the numbers of meetings which has been shown to naturally influence employee reactions to Maher's ongoing solicitations. To the contrary, during November and December employees seemed to continue sharing the by-then departed Edward Saric's opinion of Maher's reaction to their grievances and complaints: ''nothing ever happened. I didn't see any changes after I ever talked. All he would say [is] 'I hear you.' That—those are the words that he would say every five seconds.'' In fact, there is no evidence that Respondent ever resolved any grievance or complaint raised during any of the November and December meetings conducted by Maher.

To be sure, as concluded above, Respondent did violate the Act during two of the November small group meetings when Maher, at one, told employees that Respondent could not consider raises and employment improvements because of the Union's presence and, at another, proposed that an employee committee could be formed. Still, so far as the evidence shows, those had been unplanned remarks. There is no evidence that either one had been repeated by Maher at any other meeting. In these circumstances, there is no basis for concluding that, collectively, they so tainted Respondent's practice of asking for employee complaints that, by continuing that practice, Respondent had ''significantly alter[ed] its past manner and methods of solicitation during the union campaign.'' *House of Raeford Farms*, supra. In view of the foregoing considerations, I shall dismiss the allegation that Respondent, through Maher, unlawfully solicited employees' grievances and promised to remedy them.

Respondent is not so fortunate with regard to the allegations of unlawful interrogation by Maher. Three employees described questions by Maher concerning employees' reasons for supporting the Union. Packager Shawnee Johnson testified that, during one of the small group meetings, she had been asked for ''my opinion'' of the Union by Maher. In fact, though he claimed that he ''honestly'' did not ''recall'' if, during a meeting with employees, he had asked, ''Why do you want a union?'' Maher allowed that Johnson's account ''may have been something I said[.]'' I credit her testimony that, in fact, Maher had done so.

Manthey testified that, following one of the group meetings, he observed Maher ''pull Bibeau off to the side'' and ask ''her why she was voting for the [U]nion[.]'' Bibeau testified that, as she had been ''leaving from a meeting,'' she had been drawn ''aside'' by Maher who inquired, ''Well, Michelle, why do you support or why would you vote yes for a union[?]'' She testified that she had replied, ''to have a voice in how things should be run around here[.]''

Maher did not deny having questioned Bibeau. To the contrary, he testified only that he had no recollection as to whether he ever had asked any particular employee individually about union support. Johnson and Bibeau had been open supporters of the Union. Neither one answered in a manner which indicated that she had been intimidated by Maher's questioning. Still, the test for determining whether employers violate Section 8(a)(1) of the Act by their statements does not depend on reactions by particular employees—whether a particular employee happens to be a ''wilting violet'' or, conversely, a ''rough old cobb'' whom no one could intimidate. Instead, the test is one of reasonable tendency. *Lee Lumber & Building Material*, supra.

Although DuRand is Respondent's founder and president of its corporate parent, Maher had been the highest-ranking official of Respondent during November and December 1994. His questioning had occurred during, or in conjunction with, meetings convened by Respondent and which employees had been obliged to attend. On neither occasion did Maher express any reason for questioning Johnson and Bibeau. Of greater significance—in light of the background of Catlett's closure threats, and threats of adverse consequences for supporting a union, and of the unlawful discharge of Regina Saric and constructive discharge of her husband—on neither occasion did Maher give assurances that reprisals would not be visited on Johnson and Bibeau, because of their answers. Indeed, neither of those two employees were advised that refusal to answer Maher's interrogation was a legitimate course that could be followed without fear of reprisal for doing so. Finally, on both occasions Maher's questioning had been overheard by other employees.

In view of the foregoing considerations, a preponderance of the credible evidence establishes that Maher interrogated employees about their union support, that such interrogation had been coercive and, thereby, that Respondent violated Section 8(a)(1) of the Act.

The general subject of Respondent's meetings with employees involved one additional allegation, one directed to DuRand. He acknowledged that he had attend one meeting, or one set of small group meetings, at Grand Rapids during November. The complaint alleges that he had ''told employees their wages might go up without a union, but threatened that wages would go down if they selected the Union to represent them.'' DuRand denied flatly having said that wages would go down if the employees selected the Union as their bargaining agent. In light of the seeming candor of that denial, in conjunction with the seeming confusion of employee testimony as to what DuRand had actually said, I credit his denial.

Manthey testified, three times, that DuRand had said only that he would like to see everybody making seven dollars an hour, ''but right now that's not feasible'' or ''possible.'' Neither Manthey nor any other witness contradicted DuRand's testimony that he had explained to the employees that, as described in subsection A, above, initially it had been contemplated that Respondent would have a Postal Service contract ''and we had scheduled the plant to have beginning wages at seven something an hour,'' but that contract had

not materialized, with the result that Respondent was unable to pay rates which it had scheduled originally. The accuracy of the facts in that recitation are not disputed. Nor is it disputed that DuRand had advanced that explanation to the Grand Rapids employees when he had met with them. Against that background, Manthey's testimony shows no more than that DuRand, in contrast to Maher, had firmly tied his explanation of wage-increase feasibility to the actual business situation of Respondent—not to the presence or absence of employee-representation by the Union.

The second employee-witness to Du Rand's remarks was then-assembler Deborah M. Hill. She appeared to be an honest, but confused, witness. Initially, she testified that DuRand had said, ''That our wages would be lowered because of the [U]nion. If the [U]nion would come in they would be lowered.'' During cross-examination, however, she conceded that it was true that DuRand had said that employees' wages would be lowered by virtue of the fact that they would be paying union dues. Of course, it is not unlawful for an employer to alert employees to the dues-payment consequences of selecting a union as their bargaining agent. ''Mere references to the possible negative outcomes of unionization, however, do not deprive the Respondent . . . of the protections of Section 8(c) of the Act.'' (Citations omitted.) *Uarco, Inc*., 286 NLRB 55, 58 (1987).

Hill's initial testimony, ''because of the [U]nion,'' is consistent with her concession that DuRand had said that wages would be lowered as a result of any dues that employees might have to pay. Dues, and the level of them, is a matter subject to control by a union, not by an employer. To be sure, DuRand's remark was uttered in the overall context of other unfair labor practices by Respondent, including Maher's sometimes unlawful remarks during meetings similar to ones during which DuRand had spoken to the employees. Still, existence of unfair labor practices on some occasions does not altogether deprive an employer of ability to make legitimate predictions and other remarks to employees about the consequences of unionization—does not require the employer to be muzzled completely under the Act as a result of commission of some unfair labor practices.

In the final analysis, there is no substantial—or even a hint of, for that matter—evidence that DuRand had made statements such as those attributed to him by the complaint. Therefore, I shall dismiss the allegation pertaining to DuRand.

E. *Remaining Allegations Pertaining to Preelection Events*

Three additional incidents occurred prior to the representation election of December 16, 1994. Manthey testified that on one day, as he had been working, he was talking to other employees on his team, complaining about a coworker's worktime circulation of a petition which employees could sign to revoke their cards authorizing the Union to represent them. He testified that Bunn happened by and asked if he had a problem, after which she told him to report to her office. When he did so, according to Manthey, Fink had been present and Bunn had said, ''I want you to stop talking [about] this [U]nion. You are disrupting productivity and you are upsetting everybody.'' Manthey testified that he disputed those assertions, saying that his ''productivity is very high. I'm not upsetting anybody.''

Eventually, Manthey testified, Fink entered the conversation, asking him to, ''Tell me about this union. I was on vacation[.]'' As he was leaving the office, testified Manthey, Fink twice pointed out to him, ''I'm worried about my job.''

Neither Bunn nor Fink denied that this conversation had occurred. And neither one of them contested Manthey's above-described account of what the two supervisors had said to him during it.

The General Counsel alleges that Bunn's comments constituted an unlawful prohibition of discussion about the Union by Manthey. In fact, as described above, Manthey had been discussing an antiunion petition and, accordingly, his remarks had pertained to representation of employees. In consequence, the substance of his remarks were encompassed by Section 7 of the Act. Respondent makes no contention, nor is there evidence to support one, that it had any rule prohibiting worktime conversations among Grand Rapids employees. Nor did its officials dispute the testimony that those employees regularly would converse about various subjects, without restriction, as they worked.

Aside from an incident concerning defacement of a memorandum from Maher, which had led her to admonish all employees to ''concentrate on work, because our productivity was suffering,'' Bunn never contended that the productivity of Manthey, and others on his team, had been suffering during the day when she had directed him to ''stop talking [about] the [U]nion.'' Nor is there any evidence showing that his remarks to coworkers actually had impaired the productivity of any of them or, alternatively, actually had upset anyone.

Communication among employees about employment terms and conditions is important ''to the free exercise of organization rights,'' *Central Hardware Co. v. NLRB*, 407 U.S. 539, 542–543 (1972), and ''The place of work is a place uniquely appropriate for dissemination of views concerning the bargaining representative and the various options open to the employees.'' *NLRB v. Magnavox Co. of Tennessee*, 415 U.S. 322, 325 (1974). ''No restriction may be placed on the employees' right to discuss self-organization among themselves unless the employer can demonstrate that a restriction is necessary to maintain production or discipline.'' *NLRB v. Babcock & Wilcox Co*., 351 U.S. 105, 113 (1956).

Respondent has failed to show that it has embodied such a restriction in a work rule which did not permit conversation among employees as they worked. It has not presented evidence showing that Manthey's conversation had been interfering with production or had upset other employees. Nor has it shown that Bunn truly had been concerned with productivity or the affect of Manthey's comments on other employees. Therefore, I conclude that her remarks to Manthey interfered with and restrained his statutory right to communicate about representation matters with his coworkers, with the result that Respondent violated Section 8(a)(1) of the Act when Bunn directed him to stop talking to them about the Union.

More subtle is the General Counsel's allegation that Fink had interrogated Manthey when she had asked him to tell her ''about this union.'' Still, the Board has relatively recently agreed that a supervisor's question, ''What's going on; what's happening?'' with respect to a union, constituted unlawful interrogation. *Medical Center of Ocean County*, 315 NLRB 1150, 1154 (1994). Though that conclusion was reached in circumstances differing from those surrounding

Fink's question; nevertheless, her question had been asked in circumstances which were coercive.

Fink's question had been uttered in the immediate wake of an unlawful direction to Manthey to ''stop talking'' about the Union. On other dates, as concluded in preceding subsections, Respondent had committed unfair labor practices. Indeed, Manthey had been one object of some: at least one of Catlett's closure threats and Maher's statement about not being able to consider raises and employment improvements because of the Union's campaign. Moreover, before the meeting had ended in the office that day, Fink had expressed to Manthey concern about ''my job.'' While she did not state explicitly what she meant by that concern, the circumstances naturally lead an employee to connect such supervisory concern to the Union's campaign and its outcome.

Fink did advance a reason for having asked Manthey about the Union. But, it was a patently specious one. After all, she acknowledged having been working when the Union's campaign had first surfaced. She also acknowledged that employees had attempted to discuss the Union with her. As set forth in subsection C, above, she had been one of the two line leads who had informed Bunn, as they traveled to St. Paul on October 28, 1994, that a union campaign was in progress. As a result, her statement to Manthey about having been on vacation would hardly ring true as a legitimate explanation for asking broadly that he tell her about the Union.

To be sure, Fink was not a high-level supervisor. Nevertheless, her question had been addressed to Manthey in the presence of the Grand Rapids plant manager who was the highest-ranking official regularly present at the Grand Rapids facility. Fink never assured Manthey that he need not answer her question. Nor did she assure him that there would be no reprisal for whatever answer he did give her. To the contrary, an employee likely would fear reprisal, given the preceding unlawful direction to ''stop talking'' about the Union. Indeed, Fink's question appeared to be an attempt to engage Manthey in the very type of conversation which Bunn just had directed him not to engage. In the totality of the foregoing circumstances, I conclude that Fink's question had been coercive and, accordingly, had violated Section 8(a)(1) of the Act.

A second preelection incident involving Manthey occurred on the eve of that election, on December 15, 1994. As work was ending that day, Manthey received a written document, styled as a verbal warning for having been absent on December 1 and, again, on December 8, 1994, without having called in to report that he would be absent. A number of undisputed or unexplained factors serve to establish that this warning had been given to Manthey not only in retaliation for his own union sympathies, but also as a means of demonstrating to other employees the power which Respondent could exercise over their employment, should they engage in activities which displeased it, such as supporting the Union.

There is no dispute that Manthey had been absent on both December days. Respondent requires only that its employees call in to report that they intend to be absent. Manthey testified that he had done so on both dates. On December 1, he testified, he had spoken with line leader Richard ''Rusty'' McDonald and had said that, ''I would not be in and that he should relay that message and he said yes, I would.'' Then, at approximately 6:15 a.m. on December 8, testified Manthey, he had called Respondent's facility and had recorded on the answering machine that he would be absent from work that day. Bunn denied that either message had been received by her. Thus, she asserted, the reasons for the warning.

Any reliability which might be accorded to that assertion collapses in the face of certain uncontested evidence. Most importantly, Fink never contradicted Manthey's testimony that on December 2, he had spoken with her, explaining that he had called on December 1 to report that he would be absent, and that Fink had replied, ''Yeah. Rusty gave me the message[.]'' Nor did Bunn challenge Manthey's testimony that later on December 2, when she had asked where he had been and why he had not called on December 1, he had told Bunn that he had called McDonald and, when Bunn said she had not gotten that message, Fink had interjected, ''Well, Rusty gave me the message,'' and Bunn then ''said it was okay.'' As a result of this undisputed testimony, there was seemingly no legitimate basis for issuing a warning to Manthey for having ''failed to call in to report his absence of 12–1–94[.]''

Nor has Respondent shown a basis for the warning's inclusion of Manthey's December 8 absence. According to Bunn, it is standard practice for employees to report their absences by calling in and recording on the answering machine that they will be absent. As set forth above, that is what Manthey testified that he had done on December 8.

Bunn further testified that such messages are ''recorded on the supervisor's document,'' presumably by Mary Farnsworth during December 1994, since she then had been Bunn's secretary. Yet, neither ''the supervisor's document'' for December 8, showing what record had been prepared for that day, nor Farnsworth, whom Respondent never contended was unavailable to it as a witness, were produced during the hearing to corroborate Bunn's testimony regarding Manthey's December 8 absence. In subsection B, above, I pointed out that Bunn was not generally a credible witness. The absence of such potentially supporting evidence, concerning Manthey's December 8 absence, warrants an inference that, had ''the supervisor's document'' or Farnsworth been produced during the hearing, neither would have supported Bunn's assertion about absence of a record of Manthey's call that morning. That inference tends to be reinforced by the above-described evidence pertaining to inclusion of his December 1 absence in the warning which he received.

That warning, itself, is dated ''12, 9, 94.'' Yet, it is not disputed that it had not been given to Manthey until December 15, 1994, almost a week later. Respondent never explained its reason for having waited for so relatively prolonged a period, until the eve of the representation election, to hand the warning to Manthey. Absent an explanation, such timing would appear to have been intended to impress on Manthey, during the following day's election, the potential power which Respondent could exercise over his employment. And not only Manthey.

He testified that, as he had been waiting at his work station, near the exit through which other employees pass when leaving the Grand Rapids facility, for his shift to end on December 15, Catlett walked up, slapped down the warning in front of Manthey, and said, ''Here is your warning slip. Sign it. Dispute it. Do whatever you want with it and give it back to me.'' Yet, it is Respondent's practice to issue warnings to employees during private meetings, off the work floor, with

the employee's supervisor and a witness present, according to everyone who testified with particularity about that subject. Bunn claimed that the practice had been followed on December 15: that she and Catlett had met with Manthey in the conference room where the warning had been given to the latter. However, Michelle Bibeau corroborated Manthey's description. And in a graphic display of his unreliability, Catlett never truly corroborated the testimony of Bunn.

Asked first if he had ever before seen the warning, Catlett answered, ''I must have, I signed it.'' When then asked if he had given it to Manthey, Catlett responded, ''I could have, although it is not normally the practice.'' Shortly afterward, he claimed, ''I don't recall anything specific about this, so I would assume it was handled in the way they normally are.'' When he testified, Catlett had not had the benefit of having heard how Bunn would describe issuance of the warning to Manthey. It appeared that Catlett was attempting to tailor his testimony so that he would avoid saying anything which might not serve to corroborate, much less contradict, whatever description she advanced concerning delivery of the warning to Manthey.

I conclude that the warning had been given to Manthey while he had been at his work station. By issuing it in so public a fashion, Respondent accomplished not only the objective of retaliating against Manthey, but also of making an election eve demonstration to other workers of its ability to retaliate against them through their employment relationship with it. I do not credit Bunn's and, where pertinent, Catlett's testimony about the reason for the warning and the circumstances of its delivery to Manthey. Therefore, a preponderance of the credible evidence establishes that Respondent had issued the warning for the above-enumerated unlawful motives, thereby violating Section 8(a)(3) and (1) of the Act.

The final preelection incident alleged to give rise to a violation of the Act took place at the Eagle's Club during the evening of December 13, 1994. There, the Union conducted a dinner meeting with Respondent employees, in a separate back meeting room. Access to that room was gained by walking through the public restaurant and bar areas. Catlett admitted that he had gone to the Eagle's Club that evening, that he had initially sat at a table in the public area, and that, eventually, he had gone into the room where the Union's meeting was conducted by Lynnie L. Martin, the Union's business representative.

The General Counsel alleges that Catlett's very presence at the Eagle's Club that evening had constituted unlawful surveillance of Respondent's employees' union activity. The General Counsel further alleges that, after having entered the meeting room, Catlett further violated the Act by, once more, threatening that Respondent would close because of the Union. Catlett denied expressly having said that.

As to his presence at the Eagle's Club that evening, Catlett testified that he had been invited to go for an after-work drink by employee Michael Kelner. According to Catlett, it had been Kelner who had suggested going to the Eagle's Club. Neither going for an after-work drink nor going to that establishment had been unusual events, testified Catlett.

As concluded in subsection B, above, Catlett did not generally appear to be a credible witness. Kelner was never called by Respondent to corroborate Catlett's testimony about how the two of them had come to be at the Eagle's Club during the evening of December 13, 1994. Yet, Kelner had continued working for Respondent through the January 1995 mass layoff, described in subsection F, below. In fact, based on attendance records which were introduced, Kelner had continued working for Respondent into the early spring of 1995, even after the charge in the instant matter had been filed. There was neither a contention that Kelner was not available to Respondent as a witness to corroborate Catlett's testimony about the events of December 13, 1995. Nor was any evidence presented from which his unavailability could be inferred.

Both Manthey and Bibeau testified that Catlett had been seated at a table in the Eagle Club's public area from which he could observe the room where Respondent's employees were meeting with the Union. Further, while sitting at that table, it is uncontroverted, Catlett had been plainly visible to employees entering the Eagle's Club to attend that meeting. It is also undisputed that, at least during part of the evening, Catlett had been ''jotting down something,'' as he sat at that table.

Manthey testified, and Catlett acknowledged, that Catlett eventually had entered the meeting room, had spoken to Martin, and had sat down at a table where Manthey was sitting. Catlett testified that he had been invited to go there by mail stuffer/assembler Keith L. Hawkinson, when the latter had come into the Club's public area and had spoken with Catlett. According to Catlett, he had asked ''what is going to happen to me if the Union votes in?'' and Hawkinson had suggested that Catlett ''come back and talk to the representative about it[.]'' When he testified as the General Counsel's witness, Hawkinson allowed that he ''could have'' invited Catlett into the meeting room that evening. Indeed, it was plainly obvious, from his manner of answering questions about that invitation, that Hawkinson had invited Catlett into the meeting room.

Nonetheless, Catlett's testimony about Hawkinson's invitation provided another example of the former's unreliability as a witness. In describing his conversation with Hawkinson, Catlett testified that he had been curious about what would happen to him because he was ''just another hourly employee, I thought.'' It is obvious, however, that by that time Catlett could not have concluded that he was ''just another hourly employee,'' since Bunn testified, in conjunction with her effort to establish the supervisory status of the Sarics, that she had instructed Catlett and Fink not to discuss the Union with employees, because the two line leads were supervisors. In fact, Catlett admitted—grudgingly—that he had been so instructed by Bunn before December 13, 1994. Indeed, during his own description of what had occurred that very evening, Catlett characterized himself as a supervisor. So, there should have been no doubt in his own mind as to whether he was a supervisor, rather than ''just another hourly employee[.]'' Furthermore, his own admitted above-described question to Hawkinson, which had generated the latter's invitation, had violated Bunn's instruction to Catlett not to discuss the Union with employees.

Catlett acknowledged that, as he had entered the meeting room, Business Representative Martin had tried to head him off, saying that Catlett should not be there and should leave. But, testified Catlett, Hawkinson had intervened, saying, ''No, Russ is one of the good guys.'' Yet, while he effectively conceded that he had suggested that Catlett go into the meeting room, Hawkinson did not corroborate Catlett's testi-

mony concerning this exchange with Martin. To the contrary, it seems improbable that, by December 13, 1994, any employee would have viewed Catlett as ''one of the good guys,'' given the evidence, described in subsection C, above, that Catlett had been threatening closure of the Grand Rapids facility if employees working there selected the Union as their bargaining agent. Indeed, Hawkinson had been one employee to whom Catlett had directed such a threat.

Consistent with those prior threats, Manthey testified that, while in the meeting room during the evening of December 13, 1994, Catlett had said, ''I want to know what's going on. They are going to close this—they are going to close this plant and I told you that before.'' Catlett denied having threatened adverse action if employees supported the Union. Nonetheless, he never denied specifically having repeated his earlier threats of closure during the evening of December 13, 1994. Given the absence of such a denial, the consistency of a threat on that occasion with his prior closure threats, and the fact that Manthey appeared to be an honest witness, I conclude that Catlett once more had threatened closure.

That threat violates Section 8(a)(1) of the Act. Furthermore, given the unreliability of Catlett's uncorroborated explanation for his very presence at the Eagle's Club during the evening of December 13, 1994, and the description of his conduct even before he had entered the back meeting room that evening, I conclude that employees would naturally conclude that he was there to engage in surveillance of their union activities. That does, in fact, seem to be the only logical explanation for his presence there.

To be sure, that is the lone instance when Catlett or any other official of Respondent engaged in surveillance of employees' union activities. Still, that surveillance cannot be simply dismissed as an isolated single event. As concluded in preceding subsections, by December 13, 1994, Respondent had engaged in a number of unfair labor practices, including the discharge and constructive discharge of two employees. Within 2 days, it would issue an unlawfully motivated warning to Manthey, the very person beside whom Catlett sat after having entered the Eagle's Club meeting room. While there, moreover, he made another of his unlawful closure threats. In the totality of these circumstances, therefore, I conclude that Respondent violated Section 8(a)(1) of the Act as a result of Catlett's surveillance of employees' union activities during the evening of December 13, 1994.

F. *The Postelection Layoffs of 1995*

In the representation election of December 16, 1994, 20 nonchallenged eligible voters cast ballots for the Union. But, 53 employees voted against representation. Apparently no objections were filed. So, by the end of 1994 the organizing campaign passed into history.

By mid-January 1995[10] Respondent's business had declined to the point where only a single significantly sized project—bird feeder fabrication or assembly—existed for employees of the Grand Rapids facility. In consequence, on January 18 Respondent laid off most employees who had been working there. The lawfulness of its motivation for that group layoff is not challenged. However, while almost all of the layoffs had been classified as temporary, three were made permanent: those of Keith L. Hawkinson, Ricky Thayer, and Dennis Morgan. As to Morgan, Bunn testified that he had requested that his layoff be made permanent. Thus, it did not occur at Respondent's initiative.

No such request had been made by Hawkinson and Thayer, both of whom had been open supporters of the Union. Thus, every day while working prior to the representation election, Thayer had worn on his shirt a pin bearing the legend, ''Vote yes union.'' Similarly, during the 2-week period preceding that election, Hawkinson had worn at work one of the Union's pins and, as well, a hat or cap bearing the Union's name. Respondent's officials never denied having observed Thayer and Hawkinson wearing these items. To the contrary, Bunn conceded that Hawkinson ''might have had a button on,'' although she quickly qualified her concession by adding, ''but there were a lot of people wearing buttons.'' The General Counsel alleges that, in selecting for permanent layoff only union supporters Hawkinson and Thayer, Respondent had been motivated by a desire to retaliate against them because of their support for the Union.

Bunn, the official who had decided to make those layoffs permanent, denied that union sympathies and activities had played any role in her decisions. Instead, she testified, Hawkinson ''was working part time. He had back injury. He also had problems with productivity and attendance, and there were days when he couldn't finish shifts because he was obviously in pain.''

Hawkinson agreed that a back injury had caused him not only to miss work, but also had led to a reduction in the number of hours when he had been scheduled for work. His attendance record (R. Exh. 48)[11] shows that, from July 1994 through January 18, he had missed work during part or all of 26 days. Further, a timestudy report form for workdays from December 27, 1994, through January 9 shows that his average production for that period had been but 70 percent of the desired norm.

As to Thayer's selection for permanent layoff, Bunn testified, with some uncertainty, ''basically, it was attendance. I don't think he had a full week while he was there. Also, productivity might have been an issue, too, but I know it was attendance.'' Thayer's attendance record (R. Exh. 92) does show that, since beginning work for Respondent on September 19, 1994, he had missed all or part of 19 workdays and had been tardy on four other occasions. However, no timestudy report form or other record pertaining to his productivity was produced.

On December 22, 1994, Thayer had received a verbal warning concerning being late or absent. That warning stated that Thayer ''cannot be late or absent more than 1 day/month for the next 3 mos. or further action may be taken leading to suspension or dismissal.'' According to his attendance record, Thayer was tardy on December 27, 1994, and missed 2.25 hours on January 9, for ''M'' or medical/sick leave. As a result of the tardiness, by handwritten note—not an ''EMPLOYEE WARNING REPORT''—Bunn reminded Thayer of the verbal warning and of its statement about future absences and tardiness, asking what could be done to improve his situation. There is no evidence that Thayer responded to

[10] Unless stated otherwise, all dates in this subsection and in sec. II, infra, took place during 1995.

[11] A number of such attendance records were introduced. It should be noted that there are some entries, on some of them, which are virtually illegible.

that note. Nor is there evidence that Bunn ever chose to further pursue the subject with him.

Throughout winter and into the spring Respondent's business increased. However, specific descriptions of customer orders were confined mostly to Bunn's testimony and to weekly management reports which she had prepared. Not produced were records showing the points at which work commenced on specific customer's orders, week-by-week volume of such orders, and the precise point at which any given order had been completed. As will be seen in section II, infra, those omissions leave Respondent's defense lacking in support in many instances. That is, Respondent's defense is, in sometimes crucial instances, left to rely on the too often contradictory testimony of Bunn and statements in her sometimes contradictory weekly management reports.

In general, customer orders can be identified. Bird feeder fabrication existed during January and continued to be performed for most succeeding months. Added during those months, though not all at once, were two projects for 3M: the so-called tape line and a Little & Co. project. Also added were an Ergodyne project and a Dove Pack project being performed for Young America. In addition, there were some unidentified odd projects, apparently of minor significance. Finally, during March, Respondent acquired a test project from CNS Corporation for Breathe Right packaging.[12]

As work volume began to increase, Respondent started to recall laid-off employees. The initial recalls were made on January 23[13] when 21 employees were recalled. Over the course of succeeding weeks the remaining laid-off employees were recalled until, on April 26, Bradley Casper and Douglas Jaeger were recalled.[14] On the preceding day, April 25, Jacqueline ''Jackie'' Gould had returned, and on April 24, nine other employees—Michelle R. Bibeau, Shawnee Johnson, LaVonne MacAdams, Thomas E. Manthey, Bobbi McNeil, Anthony Parker, Michael F. Steffes, Paul D. Thompson, and Richard A. Yuenger—had been recalled. Of these 12 employees, the General Counsel alleges that recall of all but Gould and Casper had been delayed in retaliation for their earlier support of the Union.

Indeed, each of those 10 later-recalled employees either testified, or was identified by witnesses who testified, as having been a vocal supporter of the Union, as shown by their having worn pins or hats, sometimes both. Furthermore, despite occasional claims of lack of knowledge, at one point or another Respondent's officials—especially, Maher—acknowledged having known of the union support of each of those 10 employees.

Respondent's defenses concerning those recalls will be reviewed in greater detail in section II, infra. At this point, however, certain aspects of those defenses should be set forth. First, in addition to recalling laid-off employees, during April Respondent began hiring additional employees. The initial group of new hires began employment on April 3, followed by additional individual or groups of new hires on April 4, 5, 6, 13, 14, 17, 18, 19, 20, 21, 22, 24, 25, 27, and 28.[15] In consequence, the 10 employees alleged as discriminatees, because of belated recalls, had remained on layoff while a considerable number of newly hired employees began and continued working at the Grand Rapids facility of Respondent. Indeed, prior to April 24, the last employee to be recalled had been on March 27, aside from the above-mentioned Julia Olson who was asked to return on April 18, but who chose to continue on layoff. Even then, there is no evidence that Respondent tried to recall some other employee, to replace Olson.

Second, in the course of explaining the hiring of new employees while not recalling laid-off employees, Maher testified, somewhat uncertainly, ''I think what we were doing was saving people who had been experienced in other jobs for when those jobs—when those other jobs started over again, and that we—this was fairly—this was a new customer [CNS Corporation] and required some new training, and Lorraine [Bunn] felt that she should start with new people on nights to do that work.'' The problem with that explanation is that it did not square with what limited supporting documentary evidence Respondent did produce: Bunn's weekly management reports (R. Exh. 31).

While Bibeau and Manthey did refer to other work which they had performed briefly following their recalls, both testified to having been assigned to Breathe Right packaging. Each of Bunn's weekly management reports had subsections, two of which are titled, ''**Major Accomplishments During Past Weeks**'' and ''**Ratio goals by Project**.'' Bunn had prepared one report covering the ''Weeks of April 10 thru April 29, 1995,'' assertedly on May 2. It recites in the former subsection, ''Complete Young America and Little & Co.'' The ''**Ratio**'' subsection of that report lists only ''Breathe Right.'' And a review of available succeeding weekly management reports, through the one of ''May 22 to May 26, 1995,'' shows only ''Breathe Right'' under that same subsection. In other words, if recall of the alleged discriminatees truly had been delayed so that they could work on a project with which they were familiar, and would not have to be trained for Breathe Right's project, the fact is that, following their recalls, there is no evidence that they had been assigned to some previously performed project; from Bunn's weekly management reports, they could only have worked on the Breathe Right project.

Furthermore, weekly management reports immediately preceding the one for April 10 through 29 all list a variety of other projects under the ''**Ratio**'' subsection. As discussed in section II, infra, one of those projects is Little & Co. That

[12] Involving the type of item which came to prominence when it was worn across the bridge of his nose by Jerry Rice of the San Francisco 49ers.

[13] Night-Shift Supervisor Sandy Caverly was recalled on January 18. According to Bunn, that had occurred because of Respondent's desire to train Caverly in fabricating bird feeders, so that their assembly could be expanded to night shift.

[14] Julia Olson did not return until May 17. But, according to records submitted by Respondent, she had been recalled on April 18 and had requested that her layoff be extended for personal reasons.

[15] Specific names are recited in lists supplied by Respondent and are included in G.C. Exhs. 13 and 14. It should be noted that the two lists do not always correspond. For example, the list which is part of G.C. Exh. 13 shows that Gayle I. Miller began work on April 4, that Lorraine F. Hurlbutt began on April 6, that Raymond P. Feltus began on April 14, that David S. Shevich began on April 18, that Jamie L. Veith began on April 19, that Lisa D. Veek began on April 21, and that Ralph Sisco began work on April 24. None of these names are included on the ''CALL BACK LIST'' prepared by Respondent and included in G.C. Exh. 14 (note that both lists show a Patrick A. Veek beginning work on April 21, but only the one list also includes Lisa D. Veek).

was the very project which Maher—and Bunn, as well—sometimes appeared to be claiming had been the one for which those 10 alleged discriminatees were being held in reserve. In short, examination of the weekly management reports not only fails to support Maher's general explanation about the delayed recalls. It contradicts it.

At some points Bunn did seem to be trying to corroborate Maher's testimony about training newly hired employees for the Breathe Right work, while delaying recalling others until familiar projects became available for the latter. For example, at one point she testified, ''We were going to bring in people—the remaining people that were on layoff to work on the Little & Company Project to get that out because they had experience in doing it and it wasn't something that you could—that people could—we had a high level of quality on that too so we needed experienced people to do that project.'' Still, she had prepared the weekly management reports and, accordingly, surely had to know that, if scrutinized, those reports would not support such a general defense. Thus, she seemed to have chosen an alternative course to support Respondent's failure to recall many of the Union's supporters.

Bunn testified, and Maher did refer to, recommendations which she had made to terminate, rather than recall, some of the laid-off employees because of imperfections in their performance. In fact, some weekly management reports tend to support that testimony that Bunn had not wanted to recall some employees. For example, the one for the ''Week of 2/13/95 to 2/17/95'' states, under the ''**Anticipated Manpower Changes**'' subsection, ''Need to be thinking of the folk we will not be calling back and sending them final termination letters. New projects will be coming in and we still will have those folks expecting to come back.'' In the report for February 27 to March 3, Bunn recites, under the ''**Need for Assistance by Others**'' subsection, ''Advice from lawyer on recall plans, Saric hearing.''

Maher and Bunn both testified that the latter had not desired to bring back some of the last recalled employees because of asserted work and work-related deficiencies. And both testified that the former had overruled that desire of the Grand Rapids plant manager. At that, however, there was some disparity between their descriptions of the identities of the employees whom Bunn had not wanted to recall. Beyond that, there was disparity between their accounts of the basis for Maher's ultimate decision to recall all laid-off employees. Bunn testified that her recommendations had been rejected simply because, ''Jim Maher was really concerned that we not appear to be discriminating against anybody.'' So far as it goes, Maher corroborated that testimony. However, he went somewhat further in explaining the basis for his decision:

> Well, I—first of all, I didn't want to let anybody go if we didn't have to. And we have certainly—and I was concerned about a couple of things. First of all, did we have proper documentation if we were going to terminate them, *and I wasn't convinced that we did*. Also, I can say, because of the Union activity, I didn't want to create an appearance of discrimination. But more than anything, we had a commitment to create jobs and to run an efficient plant, and for that reason, as much as anything, I didn't want to lose anybody. So my recommendation was to not terminate them, and to try to work—you know, try to continue to work to make the thing go properly. [Emphasis added.]

As discussed in section II, infra, Maher had reason to be concerned about Respondent's documentation.

As to 9 of the 10 alleged discriminatee, Bunn advanced specific reasons for purportedly having been dissatisfied with their work. The one exception was Bibeau whom, Bunn claimed, ''probably slipped through the cracks. We just didn't call her back.'' In addition, according to Bunn, ''through the grapevine we had kind of heard she was going to school or—she had asked [sic] me earlier that she was going to go to school and finish off her degree in teaching disabled people.'' However, Bunn did not identify any specific source of such asserted information. Nor did Bunn explain with particularity how, in her view, continuing her education would necessarily interfere with Bibeau's ability to resume work at Respondent. Certainly, there is no evidence that Bibeau had ever related as much to Bunn.

As to the other nine employees, Bunn advanced a variety of explanations. Jaeger's stroke had left him with use of only one hand, and a need for an assistant at work, and he repetitively fell asleep at work, all of which impaired his productivity. Johnson's attendance had been poor, her productivity spotty and sometimes poor, and she had trouble getting along with coworkers. MacAdams had attendance problems, low productivity, needed assistance whenever lifting because of back problems, and was under medical restriction until April 24 which prevented her return to work. Because of small motor disability, Parker had trouble working on small projects and poor productivity, as well as difficulty following directions. Nonetheless, conceded Bunn, ''I don't remember if I did or not but I don't think I did'' make a recommendation that Parker not be recalled.

She acknowledged having recommending that McNeil not be recalled, because of poor stamina which led to poor attendance and poor productivity. Manthey also had attendance and productivity problems as well as inability to get along with people and to accept supervision. Because plastic-sealing adversely affected his eyes, Steffes had asked to be assigned to a separate room, off the production floor, when working and, according to Bunn, that made it difficult to supervise him and impaired his productivity. Thompson had stamina problems leading to periods when he was unable to work and, on at least one occasion, a back spasm which necessitated carrying him from the plant. Also, she testified, he had encountered problems with coworkers and had a less than satisfactory performance rating. Yuenger had mobility and hand problems which restricted his maneuverability and reduced his level of production.

II. DISCUSSION

As to the 1995 alleged acts of discrimination, the General Counsel has met the burden of proving that union sympathies and activities of each alleged discriminatees had been a substantial or motivating cause of Respondent's decisions to permanently lay off 2 and to delay until late April the recall from layoff of 10 others. Each one had openly supported the Union, by wearing a pin or hat, sometimes both. Some, such as Bibeau and Manthey, had expressly told one or more of

Respondent's officials that she or he was supporting the Union.

Bunn sometimes equivocated about the subject. But, in the end, her testimony and that of Maher shows that Respondent had been aware of the union sympathies of those 12 alleged discriminatees. Indeed, no official of Respondent ever denied specifically having been unaware of the union sympathies of any of them. At some points, Bunn attempted to add to the number of employees whom she had known to be union supporters. Her attempt, however, appeared to be an effort to escape a conclusion that Respondent had discriminated against the 12 employees named in the complaint. Her testimony in that regard was not advanced convincingly. There is no corroboration for her testimony about other employees who also had openly engaged in activity supporting the Union and sympathized with its effort to become the bargaining agent of Grand Rapids employees. In any event, ''[a]n employer's failure to discriminate against every union supporter does not disprove a conclusion that it discriminated against [some] of them.'' (Citations omitted.) *Handicabs, Inc*., 318 NLRB 890, 897–898 (1995), enfd. 95 F.3d 681 (8th Cir. 1996).

There also is substantial evidence of Respondent's hostility toward the Union and its supporters. As concluded in sections I,C through E, supra, its officials engaged in a number of unfair labor practices aimed at discouraging support for the Union and, concomitantly, displaying animus toward the efforts of some employees to become represented by it. That Respondent did not regard as off limits its control over its employees' employment, as one vehicle for retaliating against the Union's supporters and for deterring employees from choosing to be represented by the Union, is amply illustrated by the discharges, one constructive, of Edward and Regina Saric, discussed in section I,C, supra, and by the election eve public issuance of a baseless warning notice to Manthey, discussed in section I,E, supra.

To be sure, by 1995 the question concerning representation had been resolved adversely to the Union and to the 20 employees who had voted for it. Nonetheless, retaliation is inherently a motivation which extends to resentment against completed actions. The concept, by definition, is not confined to ongoing events. A retaliator can take action based on resentment harbored against someone for actions already completed. In fact, from my observation of her as she was testifying, Bunn impressed me as someone who did not lightly regard having been, in her view, crossed and as quite capable of striking out in retribution for past slights.

Beyond that, past can be prologue. While there would not be another representation proceeding conducted under the Act for 12 months, because of the restriction imposed by Section 9(c)(3) of the Act, that would not inevitably preclude altogether future efforts by employees to secure representation. There is no evidence that any of the Union's supporters had reversed their views about the desirability of becoming represented. Unlawfully motivated personnel actions, adverse to employees who once have sought representation, can serve to warn them against ''any further employee activity aimed at changing working conditions.'' *Owens-Corning Fiberglass Co. v. NLRB*, 407 F.2d 1356, 1357 (4th Cir. 1969). See also *NLRB v. Wal-Mart Stores*, 488 F.2d 114, 117–118 (8th Cir. 1973); *NLRB v. Longhorn Transfer Service*, 346 F.2d 1003, 1006 (5th Cir. 1965). Accordingly, while final resolution of the representation campaign during 1994 is a factor in evaluating motivation for Respondent's 1995 actions, that resolution does not serve to preclude completely a conclusion that Respondent had continued to act with discriminatory motivation during 1995.

To be sure, when the employment record of any one of the alleged discriminatees, save for Bibeau, is singled out and considered in isolation, a less than ideal performance is revealed. Yet, as set forth in section I,A, supra, Respondent is a nonprofit organization, with one of its goals being providing employment for the disadvantaged. As DuRand explained, MCI and its corporate subsidiaries, including Respondent, had to maintain a 75 to 25-percent ratio as to employment of the disadvantaged and, specifically, ''the Grand Rapids plant was targeted for set aside work'' under the Blandin Foundation grant which had made it possible to construct that plant. In consequence, Respondent's officials had to be aware that they would be confronting sometimes unusual situations and sometimes less than ideal work performances.

Determinations of motivation under the Act are not made on the basis of ideal, nor even objective, standards. Instead, the crucial issue is the motive, or motives, of the particular respondent who appears in each case. See discussion *Concepts & Designs*, 318 NLRB 948, 950 (1948), and cases cited therein. Where an employer has tolerated less than ideal performance, it hardly can reverse direction after a union enters the scene and begin penalizing that union's sympathizers for conduct which has been allowed beforehand. There is no such doctrine as the ''reasonable employer'' under the Act. Simply because some or most employers would not tolerate less than ideal performance does not privilege a particular employer with a history of tolerating it from beginning to penalize employees, once their union support is revealed, for continuing to engage in such previously tolerated conduct.

Here, though individual employee's attendance records were introduced, there is no way of evaluating fully on this record what levels of absence and tardiness Respondent had been excusing during 1994. What is clear from comparison of records which were produced is that neither Thayer's nor Hawkinson's attendance record had been regarded before 1995 as so deficient as Respondent now seeks to portray. Assertedly, their attendance was a factor for having selected both for permanent layoff. Yet, others with worse records were laid off only temporarily and were later recalled. Thayer's 23 days of absence and tardiness is below the level of Jacqueline Gould's 36 days or partial days of absence from October 1994 through January 18. Her 47 such absence days exceed greatly Hawkinson's 26 days of absence over the same period.

Respondent can take no solace in the warning and the handwritten note issued to Thayer in connection with his attendance. After he received the warning, his record shows that he was tardy one day and missed work for part of another day. In contrast, Gould received a verbal warning on September 22, 1994, and a written warning on November 14, 1994, both in connection with her poor attendance. The second one warned that she would be ''suspended for 2 weeks and further times missed may lead to dismissal.'' She then missed 9 days during December 1994. Still, in contrast to Thayer and Hawkinson, Gould was only temporarily, not permanently, laid off on January 18 and was eventually re-

called. That disparity was never explained by Respondent's witnesses.

Nor was Gould's attendance situation the lone inconsistency revealed by what attendance records were introduced. Linda Patterson had been temporarily laid off on January 18 and was recalled on March 21, despite an attendance record showing 40-full or partial days of absence during approximately the same period as Hawkinson had worked for Respondent. Virginia Long had missed 21 full or partial days of work, but was laid off temporarily on January 18 and recalled on February 27. From July 1994 to January 18, Paul Thompson had missed a total of 27 days and Shawnee Johnson had missed 22 days. Both had been laid off only temporarily on January 18. Even though Bunn had recommended that Thompson and Johnson not be recalled, that fact does not erase the fact that their layoffs had been but temporary, while those of Thayer and Hawkinson had been permanent. Respondent never explained that inconsistency.

It should not be overlooked that there is no evidence that Hawkinson ever had received any type of warning regarding attendance deficiencies. Respondent did produce a timestudy report for him, showing that he had averaged only 70 percent of the desired production level during late December 1994 and early January. But, Respondent's defense to his permanent layoff can hardly take refuge in that document. Similar reports were introduced for temporarily laid-off employees Bobbi McNeil, showing a 54 percent average, Anthony Parker, showing a 51 percent average, and for LaVonne MacAdams, showing a 62 percent average. No explanation was advanced as to the inconsistency created when those averages were overlooked and those three employees were laid off temporarily, while Hawkinson was laid off permanently.

Certainly, Hawkinson's part-time status provides no distinction. Several other employees also had been working less than full days prior to January 18. Of course, Bunn testified that it had been that factor, taken in conjunction with attendance and productivity, which collectively had dictated selection of Hawkinson for permanent layoff. However, Respondent never produced attendance and productivity records for those other employees. More importantly, any ''collectively'' argument implodes when Thayer's permanent layoff is taken into account. He had not been a part-time employee. No timestudy report was introduced for him, though there is no contention that one never had been prepared. Such an omission is significant, given Bunn's half-hearted effort to portray Thayer's productivity as possibly an issue—''might have been an issue''—in his selection for permanent layoff.

Viewing the matter from an overall perspective, it becomes even more inexplicable how Respondent could have legitimately chosen to permanently layoff Hawkinson and Thayer. After all, its layoffs of every other employee on January 18, even those whom Bunn later tried to avoid recalling, had been only temporary. If Bunn actually had wanted to terminate the employment of additional employees, then unexplained is Respondent's failure to lay them off permanently, as well. Instead, it picked and chose. And not well.

Only 20, of over 70 eligible, employees had voted for the Union. Respondent's witnesses never contended that they believed that Hawkinson and Thayer, both of whom had worn union insignia, had not voted for the Union. As a result, permanent severance of those two employees' employment seemingly eliminated 10 percent of the Union's supporters. That fact would not likely escape notice by other employees, both those retained and those laid off temporarily.

In sum, I do not credit the defense presented by Respondent concerning the permanent layoffs of Hawkinson and Thayer. A preponderance of the credible evidence establishes that those two employees had been selected for permanent layoff in retribution for their support of the Union and, perhaps also, to demonstrate to others the potential consequences of such support, just as the method for issuing Manthey's election-eve warning notice had served as a demonstration of Respondent's power over employees' employment. Therefore, I conclude that, by permanently laying off those two employees, Respondent violated Section 8(a)(3) and (1) of the Act.

So, also, does a preponderance of the credible evidence establish that the delayed recalls of the other 10 alleged discriminatees had been unlawfully motivated. Viewed from an overall perspective, Respondent's testimony about that delay makes no sense when compared with the only records of work at Grand Rapids, the weekly management reports prepared by Bunn, which were offered by Respondent. If, as Maher testified, recall of those employees truly had been deferred to avoid training them for Breathe Right's project, and then effectively having wasted that training by reassigning them to an anticipated incoming project with which they were familiar, Bunn's reports simply do not support that testimony. For the weekly management reports for April 10 through May 26, the last date for which such reports was introduced by Respondent, show no project other than Breathe Right's having been performed at Grand Rapids.

Thus, Bunn's weekly management reports recite that work on the Little & Co. project began during the week of March 6 to 10 (''Little & CO [sic] start up at 2.3''). That work continued for the remainder of that month and into the week of April 3 to 8. The weekly management report for April 10 through 29 states, under ''**Major Accomplishments During Past Weeks**'': ''Complete Young America and Little & Co.'' No later weekly management reports disclose any work having been performed on a Little & Co. project.

The Dove project for Young America also had been completed by the time of, or very soon after, the alleged discriminatees' recall. Not only is that fact recited in the above-quoted excerpt from Bunn's report, but the last ''Dove Pack'' entry on her reports appears among the ''Ratio'' subsection listings in the weekly management report for the week of April 3 to 8, after having been included in that subsection in the reports for the weeks of March 6 to 10 and of March 13 to 18.[16]

The weekly management reports reveal that 3M's tape line work had been performed as early as the week of January 30 through February 3. That project picked up as Respondent's personnel learned to operate the Label Aire, during the weeks of February 6 to 10 and February 13 to 17. The project was completed without further apparent problem by

[16] Bunn asserted that she had no time to prepare a weekly management report for the period from March 20 to April 1. Perhaps. Still, it is not implausible, given her general unreliability and disclosures from other records discussed in this section, that Bunn had prepared such a report, or reports, encompassing that period, but had chosen to withhold it or them because it or they contained information even more damaging to Respondent's defense.

the week of April 3 to 8. No mention of the tape line appears in subsequent weekly management reports.

Similarly, the Ergodyne project first appears in Bunn's report for January 30 to February 3 (''Set-up Ergodyne'' and ''Ergodyne set-up went well''). It continues to appear in succeeding weekly reports until the one of April 3 to 8, after which it is no longer mentioned.[17]

In sum, the information in the weekly management reports refute any testimony of Maher, as well as that of Bunn, about having delayed recall of the alleged discriminatees to allow them to be assigned to familiar work, instead of the Breathe Right project, which Respondent anticipated receiving at Grand Rapids. Those types of projects identified by Maher and Bunn had existed before April. For the most part, they ended before late April. The alleged discriminatees could only have been assigned to Breathe Right's project following their recalls.

Apparently realizing that Respondent was bereft of a truly project-related basis for defending the delayed recall allegation, Bunn seems to have searched the objectively imperfect employment records for nine of the discriminatees and, based on them, to attempt constructing defenses for their delayed recalls. In other words, Bunn slung mud, hoping that some of it might stick. In the final analysis, none truly did.

The general problem with that approach is that it left unexplained inconsistencies among what limited evidence was introduced by Respondent. For example, no matter how flawed their performances may have been, as a general proposition, the nine discriminatees' performances had been no less imperfect when viewed after January 18 than before then. Yet, not only were those nine employees not terminated prior to January 18, but they were not permanently laid off, as were Hawkinson and Thayer, and were eventually recalled.

Bunn appeared to be trying to avoid such a conclusion when she, supported by Maher, testified that those employees had been recalled because Maher had wanted to avoid the appearance of discrimination which nonrecall might create. Any logic to such a defense, however, tends to be undermined by the absence of similar concern about the permanent layoffs of union supporters Hawkinson and Thayer on January 18. The unfair labor practice charge underlying this proceeding had not been filed until April 25. There is no evidence that any event occurred between those dates which might have led Maher to become more sensitive to such an appearance than he would have been on January 18. Yet, Bunn never claimed that discriminatory appearance had been a concern when Hawkinson and Thayer had been permanently laid off. That inconsistency provides some support for a conclusion that the recall-delay, especially in light of the April new hires and the type of work available, had been nothing more than an effort to punish those 10 employees for having supported the Union and, further, to impress on them and their coworkers the power which Respondent could exercise should they renew efforts for representation.

Significantly, what is admitted by Maher, as quoted in section I,F, supra, is that he had not been ''convinced that'' Respondent possessed ''proper documentation if we were going to terminate'' at least the discriminatees whom Bunn recommended not be recalled. Of course, if that documentation would not support termination, it is somewhat inconsistent to now argue that it does support delay in recalling them. Such an admission by Respondent's then-president and chief operating officer casts doubt on the reliability of Respondent's records as a basis for any adverse employment action against those employees. In fact, from scrutiny of the testimony and what records have been produced, surely Maher's concern had not been misplaced.

As pointed out above, in evaluating the employment records, the issue is not confined simply to how those records might be viewed by some sort of ''reasonable employer'' in the abstract. Instead, evaluation must proceed on the basis of deficiencies which Respondent had chosen to tolerate or, given its employment objectives, what employment difficulties it had anticipated and been willing to accommodate.

For example, it cannot be disputed that Thompson, McNeil, MacAdams, Manthey, and Johnson each had experienced attendance deficiencies. So far as the record shows, nevertheless, only Johnson ever received an employee warning about attendance. That warning for ''excessive absenteeism'' had purportedly been issued because Johnson had missed all or part of three workdays, and had been tardy once, between December 6 and January 5, a 31-day period. Yet, there is no evidence that a similar warning had been issued to Virginia Long when she had missed 5 hours of work on each of 11 days during September of 1994. Nor is there evidence that such a warning had been issued to Linda Patterson for having missed all or part of six workdays during October 1994. For that matter, there is no evidence that a warning notice had been issued to McNeil for 8 days of absence during August 1994.

Of course, those three employees' absences had occurred before advent of the Union's organizational campaign. In contrast, as with Thayer, the attendance warning to Johnson had not issued until after disclosure of her sympathies for the Union. That timing is some indication of an effort to construct an adverse employment record against her. That indication is strengthened by three other facts concerning that warning notice.

First, the ''WARNING DATE'' which appears on Johnson's warning is ''1/16/95,'' before she had been temporarily laid off 2 days later. But, so far as the evidence shows, Bunn did not prepare and sign the warning until January 19, the day after the layoff. Bunn never explained why she had felt that belated preparation of such a warning notice, pertaining to by-then somewhat stale incidents, had seemed necessary. Of course, it would serve to create—or, at least buttress—a defense of an unsatisfactory record for Johnson.

Second, Johnson never signed the warning notice and, indeed, there is no evidence that she ever had been aware that

[17] Even though the weekly management report for the week of March 6 through 10 states, under ''**Major Accomplishments During Past Week**,'' that, ''Ergodyne orders complete.'' Since Ergodyne work continued to be mentioned in the succeeding 2 weeks' reports, that quoted entry may say something about ability to rely unreservedly on what is recited in Bunn's weekly management reports. Beyond that, such inconsistency would tend to indicate that, despite the work recited in those reports covering late April and early May, Bibeau and Manthey were being truthful when each testified to having been assigned briefly to other projects when recalled, before having been reassigned to the Breathe Right one, even though Breathe Right is the only project listed in the ''**Ratio**'' subsection for weekly management reports after the one of April 3 through 8.

it had been prepared. Such a procedure is contrary to Respondent's own procedure and practice for issuing warning notices, as discussed in section I,E, supra. Significantly, as concluded in that section, practice, and procedure also had been disregarded when the unlawfully motivated warning notice had been issued to Manthey on the eve of the representation election.

Third, and most importantly, Bunn claimed that, by January, Johnson ''had excessive absenteeism. Jackie Stalberger had warned her back in August on absenteeism at that time and Carol Fink had warned her on absenteeism on the—on November 22nd. This would have been the third warning on absenteeism[.]'' That testimony is patently false.

The only August 1994 warning issued to Johnson, so far as the record discloses, had been for, ''Horseplay—put tape in Rusty McDonald's hair[.]'' No mention of attendance is made in it. The November 22, 1994 warning was for ''*constant* use of four letter words at or near full volume'' while working with some other employees, one of whom had complained. Again, no reference to Johnson's attendance appears in that warning notice. Stalberger was never called as a witness by Respondent to testify about some other August 1994 warning to Johnson, though there was neither evidence nor representation that she was not available as a witness. Fink did appear as a witness for Respondent. She gave no testimony about any other warning to Johnson on November 22, 1994, in connection with the latter's attendance.

Respondent's situation does not improve with respect to the performance records which it chose to introduce. As pointed out above, produced were some timestudy report forms for the last few workdays of December 1994 and the first few days of January. One for Parker shows that his average production during that period had been 51 percent of the desired level, while that for McNeil had been 54 percent and that for MacAdams had been 62 percent. But, Respondent never called as a witness the individual who had conduct the testing and prepared those reports. So, there is no basis for evaluating that testing's methodology, much less for ascertaining the number of such tests then conducted and the comparative average percentages of all of them.

That point should not be overlooked. From what records of Respondent were subpoenaed by the General Counsel, there was produced a timestudy report form, covering the same period as the three above-mentioned ones, for Dean R. Mischke. The average recited on it is 56 percent of the desired level. That is not too terribly higher than those of Parker and McNeil. It is lower than that of MacAdams and, also, of the 70 percent average assigned to the timestudy of Hawkinson's work. Yet, Mischke, who was not credibly shown to have been a union supporter, had been laid off only temporarily on January 18 and had been recalled on February 27. Moreover, despite his 51-percent average productivity shown on the timestudy report form for his work, Parker was not included among the employees whom Bunn recommended not be recalled.

In addition, Respondent introduced selected employee performance rating forms for several alleged discriminatees. These forms rate employees—as unsatisfactory, marginal, acceptable, commendable, or outstanding—in 14 areas, with an overall rating then being determined by the sum of those 14 subratings. An overall ''A'' or acceptable rating is ''251–350,'' according to the printed legend on the form.

The form for Manthey shows a 250 overall rating. The comparable overall rating for Thompson and McNeil was 245, for Jaeger was 200, for Johnson was 185, and for MacAdams was 180. Left undisclosed were the ratings assigned on similar forms for recalled employees. As a result, Respondent has failed to show, on an objective basis, that those ratings differed significantly from the averages assigned to employees who were recalled prior to April 24.

From subpoenaed records, the General Counsel produced an employee performance rating for Travis Landin, covering the period May through November 1994. The calculation of a total average on that form has not been made. However, by multiplying the ratings recited in the 14 individual areas by the appropriate ''Weight Factors,'' a total rating of 210 is derived. Though obviously higher than the totals for MacAdams, Johnson, and Jaeger, Landin's total is lower than the averages assigned for Thompson, McNeil, and Manthey. But, Respondent displayed no concern about recalling Landin from his January 18 layoff. In fact, he was recalled on March 27. Of course, a single seemingly inconsistent situation is not necessarily determinative. Still, it went unexplained. Surely it was within Respondent's power to introduce other employee performance ratings which might have showed that Landin's situation was aberrant. Yet, it never did so and the record must be taken as it exists.[18]

One more point is worth consideration in connection with the employee performance ratings which Respondent produced. Bunn conceded that not until mid-April had she reviewed the ones for Manthey, Thompson, McNeil, Jaeger, and Johnson. By then, from their testimony, it appears that Maher already had instructed Bunn to recall all remaining laid-off employees. Nonetheless, she wrote on the bottom of each of those five ratings that she did not recommend recall. Bunn never explained why she had chosen to make such entries after, seemingly, she already had been instructed to recall those employees, as well as the others still on layoff. Absent a legitimate explanation, there is some basis for concluding that she, again, was attempting to construct—or, at least, shore up—a defense for Respondent, rather than expressing a genuinely motivated recommendation.

That conclusion is reinforced by what Bunn had written when she reviewed Jaeger's employee performance rating, apparently on January 18. ''Doug is on lay off will go into effect when he returns 'Note he has been having trouble staying awake [&] finishing the shift.[']'' That statement appears to convey that, as of January 18, Bunn had harbored no reservations about recalling Jaeger. Yet, he turned out to be one of the very last two recalled employees, excluding Julia Olson who chose not to return until later.

The other employee recalled on April 26, along with Jaeger, had been Bradley Casper. There is no evidence that he had been a supporter of the Union. Yet, Respondent's defense finds no support simply because one of the last recalled employees had not supported the Union. The Board has held that adverse action directed also to an employee who was not

[18] No doubt a number of records would be involved, not only with respect to performance ratings, but also for other areas such as attendance, given the number of employees working at Grand Rapids for Respondent. Still, failure to produce material evidence cannot be excused simply, because it would be voluminous. Indeed, some mitigation of such situations is expressly provided by the availability of the procedure set forth in Fed.R.Evid. 1006.

a union supporter does not, standing alone, preclude absolutely a finding of discrimination against employees who, like Jaeger, had supported a union. *Frank Leta Honda*, 321 NLRB 482 at fn. 5 (1996).

Beyond that, Bunn complained of Casper's attendance and production problems. However, Respondent produced no records demonstrating that such problems truly had existed or, if so, the extent of them in comparison to the attendance and production records of some discriminatees. There is no evidence that Bunn ever had recommended that Casper not be recalled from layoff. Moreover, delay in recalling him actually appears to have been unrelated to any employment deficiencies which Casper could control.

Bunn testified that Casper had ''heart problems and we didn't have anybody at that time that was rated CPR.'' Respondent, Bunn continued, ''finally did [get someone with CPR training] but he was one of the folks that was last called.'' Bunn never contended that Casper would not have been earlier recalled, had Respondent sooner been able to employ someone else who possessed CPR training. In consequence, his belated recall cannot truly be used as a comparison for the belated recalls of the 10 union supporters.

Aside from attendance and production, Bunn voiced other complaints about various alleged discriminatees. Some of those complaints were supported by documentation. In the final analysis, however, at best they showed only an effort to construct pretexts to establish legitimacy for truly unlawfully motivated delay in recall. For example, as recited above, Johnson had received warnings in August 1994, for horseplay, and on November 22, 1994, for having used foul language. Two handwritten ''INCIDENT REPORTS,'' both dated December 29, 1994, were placed in her personnel file. One was for derogatory remarks about a situation arising from another employee's ileostomy. The other was for purportedly snatching other employees' work and adding it to her own, thereby making her appear more productive than was the fact.

Still, neither of those asserted December 1994 incidents had been memorialized in a warning notice. Under Respondent's procedures, that meant that their contents need not have been shown to Johnson. And, in turn, that meant that she had been unable to dispute what had been written on those post-election incident reports. Nor was Johnson suspended for her purported derogatory remarks about the ileostomy-related situation. Yet, seemingly that would be regarded by Respondent as harassment of a coworker. Her November 22, 1994 warning has stated that she would be suspended for 2 weeks should she again abuse a coworker. The fact that Respondent failed to take such action raises some suspicion concerning the occurrence of the incident described in that incident report—suspicion that, following the representation election, Bunn had set out to construct cases against the Union's supporters.

Respondent produced a verbal warning issued to Thompson for having threatened another employee. But, it is dated November 23, 1994. There is no evidence that Thompson ever repeated such conduct. There is no evidence that he ever had received any other warning for any other misconduct.

Yuenger assertedly had problems maneuvering in the Grand Rapids facility, sometimes falling into inanimate objects and into other workers there. Bunn testified that he should have been using a wheelchair, but was unwilling to use any assistance other than a four-footed cane which failed to correct the problem. She also testified that, in an evaluation, Yuenger had achieved on 29 percent of desired productivity. But, Bunn's testimony about Yuenger's supposed maneuverability problems went uncorroborated. And the report reciting that he had achieved only 29 percent of desired productivity had been prepared on September 4, 1994. Of course, by January that evaluation had become rather dated. In any event, despite that seemingly adverse evaluation, he had been retained thereafter as an employee of Respondent.

More pertinent was Yuenger's employee performance rating of January 19. Under the ''Quantity of Work Rating,'' he received 70–90 percent of the competitive standard. True, that is a marginal rating. Nonetheless, it represents improvement over the above-described earlier rating.

Bunn accused Manthey of inability ''to get along with other people. Also he was hard to supervise.'' She advanced no particularized evidence to support the first accusation. When an explanation for the second one was sought, she testified, ''He was abrasive. Anytime we had meetings or attempted to talk with him he was abrasive,'' claiming that he had been so with her. But, she provided no concrete examples of what she meant. Further, no warnings to Manthey for ''abrasive'' behavior were produced, though Respondent obviously issued warnings to employees whenever it felt that their conduct had been improper.

Of course, one cannot overlook Manthey's outspoken activism on behalf of the Union, as shown when he informed Bunn of his union support in the wake of the Sarics' terminations, as described in section I,C, supra. Moreover, during his meetings described in section I,D, supra, Maher had voiced opposition to the Union, a position contrary to that of Manthey. If those had been the meetings to which Bunn was referring, and if she meant by ''abrasive'' that Manthey had spoken up and expressed his own position about the Union, contrary to the one being voiced by Maher, then Manthey's activity had been protected by Section 7 of the Act. In short, so far as the evidence discloses, there is no particularized support for Bunn's assertions about purported dissatisfaction with Manthey.

As to Steffes, Bunn testified that he had to be assigned to a separate room, due to his sensitivity to the plastic-sealing process, and that separate space had not been available for him during the late winter and spring of 1994, due to materials being stored for orders which had to be assembled and packed. Inasmuch as Respondent produced no records concerning the volume of work being performed from late January through April, there is no objective corroboration for her testimony that separate space for Steffes had not then existed.

Bunn did not improve Respondent's situation by also complaining that Steffes's isolation in a separate room had affected ''plant productivity'' and had made it ''hard for the supervisors to keep an eye on him and help them if they needed help[.]'' Neither Line Lead Catlett nor Line Lead Fink, the immediate supervisors of assembly and packaging employees since late September 1994, corroborated Bunn's claimed difficulty in supervising Steffes, though both Catlett and Fink testified as witnesses for Respondent. There is no other evidence supporting a conclusion that isolatedness had affected Steffes's productivity. Indeed, Respondent's failure

to produce records pertaining to his productivity, though it produced such records for selected other alleged discriminatees, is some indication that Steffes had not been unproductive.

As to Bibeau, Bunn claimed that Respondent simply had overlooked calling her back earlier: ''she probably slipped through the cracks.'' That is difficult to accept. Bunn and Maher both testified to ongoing dialogue between them about recalling laid-off employees. As shown by his remarks to her in connection with his meetings with Grand Rapids employees, as described in section I,D, supra, Maher knew who Bibeau was. In fact, he had mentioned creating a special job for her. Further, Bunn prepared Weekly Management Reports in which recall of laid-off employees had been one subject mentioned regularly. In light of these facts, it is not reasonable to believe that Bibeau simply had been overlooked in deciding which employees to recall from layoff.

Respondent produced no evidence—testimony or records—of deficient performance by Bibeau. It appeared that, lacking a performance-based explanation for Bibeau's belated recall, Bunn simply was trying to construct some reason which could be accepted as legitimate. In the totality of the circumstances, I do not credit the one which she tried to supply.

There does appear to be a basis for not having recalled LaVonne MacAdams prior to April 24. After being laid off on January 18, she filed a Worker's Compensation Claim because of an injured thumb. Bunn testified, and MacAdams was never called during rebuttal to refute, that MacAdams had not been able to return until she obtained a doctor's release. Respondent produced a record of treatment for April 24. It is not a release to return to work, as such. On its right side, however, is written the date April 24 after ''Est. end of Disability'' and April 25 after ''Return to Work.'' Those dates do appear to support Bunn's testimony about the inability of MacAdams to return to work before April 24.

Yet, above the handwritten entries on the treatment record appears a handwritten disability period of from only ''14 Apr to 24 Apr.'' That would appear to mean that MacAdams could have been recalled to work for Respondent prior to April 14. In the final analysis, the record in the instant case is not sufficiently complete to evaluate what her physical situation had been prior to then. For example, could MacAdams have returned to work before April 14? Was this some type of elective treatment which could have been deferred, had she been recalled? The availability for work of MacAdams is an issue better addressed during the compliance phase of this proceeding, when more specific information about her injury and treatment can be obtained and reviewed. See *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 902 (1984).

In all other respects, I conclude that Respondent's defenses to the late April recalls are not credible. Consequently, a preponderance of the credible evidence establishes that the belated recalls of those union supporters had been unlawfully motivated by intent to, at least, retaliate against each for having supported the Union and, beyond that, to serve as a lesson should Grand Rapids employees contemplate future efforts to secure representation. It also may be that by delaying those recalls, Respondent had harbored hope that some, or all, of those 10 employees might locate work elsewhere and that it would no longer have to be concerned about continuing to employ individuals whose sympathies toward unionization had been revealed. In any event, a preponderance of the credible evidence establishes that by delaying recalls of those employees, Respondent violated Section 8(a)(3) and (1) of the Act. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

I do not, however, reach any conclusion as to the exact date on which any of those 10 discriminatees should or would have been recalled. Given the paucity of records which have been produced during this proceeding, such a determination cannot be made, but must be deferred until compliance when additional records can be examined to ascertain the precise amount of backpay owed each one.

CONCLUSIONS OF LAW

MDI Commercial Services has committed unfair labor practices affecting commerce by discharging Regina Saric and by constructively discharging Edward Saric on October 31, 1994, by issuing an employee warning to Thomas E. Manthey on December 15, 1994, by permanently laying off Keith L. Hawkinson and Ricky Thayer on January 18, 1995, and by delaying recalling from temporary layoff Michelle R. Bibeau, Douglas Jaeger, Shawnee Johnson, LaVonne MacAdams, Thomas E. Manthey, Bobbi McNeil, Anthony Parker, Michael F. Steffes, Paul D. Thompson, and Richard A. Yuenger, because each of those employees had supported or seemed to support International Brotherhood of Electrical Workers, Local 160, AFL–CIO in violation of Section 8(a)(3) and (1) of the Act, and by threatening that it knew who had started the organizing campaign for that labor organization and would not tolerate it, by threatening that employees who became involved with that labor organization would suffer termination or other adverse consequences, by threatening that its Grand Rapids facility would be closed if employees selected that labor organization as their collective-bargaining agent, by coercively interrogating employees about their union sympathies and activities, by encouraging employees to abandon that labor organization in favor representation by an employee committee, by threatening that wage increases and other improvements in employment terms and conditions could not be made while an organizing campaign was in progress and a representation proceeding was in progress, by prohibiting an employee from talking with coworkers about the above-named labor organization, and by engaging in surveillance of employees' union activities in violation of Section 8(a)(1) of the Act. It has not violated the Act in any other manner alleged in the complaint.

REMEDY

Having concluded that MDI Commercial Services has engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and, further, that it be ordered to take certain affirmative action to effectuate the policies of the Act. With regard to the latter, it shall be ordered to, within 14 days from the date of this Order, offer Regina Saric, Edward Saric, Keith L. Hawkinson, and Ricky Thayer full reinstatement to the positions which each one held prior to her/his discharge, constructive discharge or permanent layoff, dismissing, if necessary, anyone who subsequently may have been hired or assigned to her/his job. If one or more of those jobs no longer exist, Regina Saric, Ed-

ward Saric, Hawkinson, and Thayer will be offered employment in a substantially equivalent job, without prejudice to seniority or other rights and privileges which would have been enjoyed had there been no unlawful discharge, constructive discharge or permanent layoff.

It shall be further ordered to make whole Regina Saric, Edward Saric, Keith L. Hawkinson, and Ricky Thayer for any loss of earnings and other benefits suffered as a result of the discrimination against each of them. It also shall be ordered to make whole Michelle R. Bibeau, Douglas Jaeger, Shawnee Johnson, LaVonne MacAdams, Thomas E. Manthey, Bobbi McNeil, Anthony Parker, Michael F. Steffes, Paul D. Thompson, and Richard A. Yuenger for any loss of earnings and other benefits suffered as a result of delaying their recall from temporary layoff. Backpay in each instance shall be computed on a quarterly basis, making deduction for interim earnings, *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and with interest to be paid on amounts owing, as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

It shall be further ordered to, within 14 days from the date of his Order, remove from its files the verbal employee warning record issued to Thomas E. Manthey on December 15, 1994, and, as well, all references to the unlawful discharge of Regina Saric and constructive discharge of Edward Saric on October 31, 1994, the permanent layoffs of Keith L. Hawkinson and Ricky Thayer on January 18, 1995, and the delayed recalls of Michelle R. Bibeau, Shawnee Johnson, LaVonne MacAdams, Thomas E. Manthey, Bobbi McNeil, Anthony Parker, Michael F. Steffes, Paul D. Thompson, and Richard A. Yuenger on April 24, 1995, and of Douglas Jaeger on April 26, 1995. Within 3 days after removal of that material from its files, MDI Commercial Services shall notify each one of those employees in writing that this has been done and that those documents shall not be used against her/him in any way.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[19]

ORDER

The Respondent, MDI Commercial Services, Grand Rapids, Minnesota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening that it knows who has started an organizing campaign for International Brotherhood of Electrical Workers, Local 160, AFL–CIO, or any other labor organization, and will not tolerate such activity; threatening that employees who become involved with that, or any other, labor organization will suffer termination or other adverse consequences; threatening that the Grand Rapids facility will be closed if employees working there select the above-named, or any other, labor organization as their collective-bargaining agent to represent them; coercively interrogating employees about their union sympathies and activities; encouraging employees to abandon the above named, or any other, labor organization as a collective-bargaining agent, in favor of representation by an employee committee; threatening that wage increases and other improvements in employment terms and conditions cannot be considered and implemented while a union organizing campaign and a representation proceeding are in progress; prohibiting employees from talking about the above-named, or any other, labor organization; and engaging in surveillance of employees' union activities.

(b) Discharging Regina Saric, constructively discharging Edward Saric, issuing warning notices to Thomas E. Manthey, permanently laying off Keith L. Hawkinson and Ricky Thayer, and delaying recall from layoff of Michelle R. Bibeau, Douglas Jaeger, Shawnee Johnson, LaVonne MacAdams, Thomas E. Manthey, Bobbi McNeil, Anthony Parker, Michael F. Steffes, Paul D. Thompson, and Richard A. Yuenger, or otherwise discriminating against any of those employees, or any other employee, because of sympathy or support for the above-named labor organization, or any other labor organization.

(c) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer full and immediate reinstatement to Regina Saric, Edward Saric, Keith L. Hawkinson, and Ricky Thayer or, if the job held by any of them no longer exists, to a substantially equivalent position, without prejudice to her/his seniority or any other rights or privileges.

(b) Make whole Regina Saric, Edward Saric, Keith L. Hawkinson, Ricky Thayer, Michelle R. Bibeau, Douglas Jaeger, Shawnee Johnson, LaVonne MacAdams, Thomas E. Manthey, Bobbi McNeil, Anthony Parker, Michael F. Steffes, Paul D. Thompson, and Richard A. Yuenger for any loss of earnings and other benefits suffered as a result of the discrimination directed against them in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Regina Saric and unlawful constructive discharge of Edward Saric on October 31, 1994, to the unlawful warning notice issued to Thomas E. Manthey on December 15, 1994, to the unlawful permanent layoffs of Keith L. Hawkinson and Ricky Thayer on January 18, 1995, and to the unlawfully delayed recalls of Michelle R. Bibeau, Shawnee Johnson, LaVonne MacAdams, Thomas E. Manthey, Bobbi McNeil, Anthony Parker, Michael F. Steffes, Paul D. Thompson, and Richard A. Yuenger on April 24, 1995, and of Douglas Jaeger on April 26, 1995, and within 3 days thereafter notify each of those employees in writing that this has been done and that none of those acts of discrimination will be used against any of them in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Grand Rapids, Minnesota, place of business copies of the at-

[19] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

tached notice marked ''Appendix.''[20] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by its authorized representative, shall be posted by MDI Commercial Services and maintained by it for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. It shall take reasonable steps to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, it has gone out of business or closed the Grand Rapids facility involved in these proceedings, MDI Commercial Services shall duplicate and mail, at its own expense, a copy of the notice to all current employees and all former employees employed by it at any time since October 31, 1994.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to steps that it has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not found herein.

[20] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a trial at which all parties had an opportunity to present evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act and we have been ordered to post this Notice.

The National Labor Relations Act gives all employees the following rights:

To organize
To form, join or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten that we know who has started an organizing campaign for International Brotherhood of Electrical Workers, Local 160, AFL-CIO, or any other labor organization, and will not tolerate such activity.

WE WILL NOT threaten that if you become involved with the above-named labor organization, or any other labor organization, you will suffer termination or other adverse consequences.

WE WILL NOT threaten that our Grand Rapids, Minnesota, facility will be closed if you choose to be represented by the above-named labor organization, or any other labor organization, as your collective-bargaining agent.

WE WILL NOT coercively interrogate you about your sympathies for, or activities on behalf of, the above-named labor organization, or any other labor organization.

WE WILL NOT encourage you to abandon representation by the above-named labor organization, or any labor organization, in favor of representation by an employee committee.

WE WILL NOT threaten that wage increases and other improvements in employment terms and conditions cannot be considered and implemented while a union organizing campaign and a representation proceeding are in progress.

WE WILL NOT prohibit you from talking about the above-named labor organization or any other labor organization.

WE WILL NOT engage in surveillance of your activities on behalf of the above-named labor organization or any other labor organization.

WE WILL NOT discharge Regina Saric, constructively discharge Edward Saric, issue warning notices to Thomas E. Manthey, permanently layoff Keith L. Hawkinson or Ricky Thayer, delay recalling from layoff Michelle R. Bibeau, Douglas Jaeger, Shawnee Johnson, LaVonne MacAdams, Thomas E. Manthey, Bobbi McNeil, Anthony Parker, Michael F. Steffes, Paul D. Thompson, and Richard A. Yuenger, or otherwise discriminate against any of those employees, or any other employee, because of their sympathy for, or activities on behalf of, the above-named labor organization, or any other labor organization.

WE WILL NOT in any manner interfere with, restrain, or coerce you in the exercise of your rights protected by the National Labor Relations Act.

WE WILL, within 14 days from the date of this Order, offer Regina Saric, Edward Saric, Keith L. Hawkinson, and Ricky Thayer full reinstatement to the job from which each was unlawfully terminated or, if one or more of those jobs no longer exists, to a substantially equivalent position, without prejudice to seniority or any other rights and privileges which she/he would have enjoyed had we not unlawfully discriminated against each of them .

WE WILL make whole Regina Saric, Edward Saric, Keith L. Hawkinson, Ricky Thayer, Michelle R. Bibeau, Douglas Jaeger, Shawnee, Johnson, LaVonne MacAdams, Thomas E. Manthey, Bobbi McNeil, Anthony Parker, Michael F. Steffes, Paul D. Thompson, and Richard A. Yuenger for any loss of earnings and other benefits suffered as a result of our discrimination against them, plus interest on the amounts owing.

WE WILL, within 14 days from the date of this Order, remove from our files any references to the unlawful discharge of Regina Saric and the unlawful constructive discharge of Edward Saric on October 31, 1994, to the unlawful warning notice issued to Thomas E. Manthey on December 15, 1994, to the unlawful permanent layoffs of Keith L. Hawkinson and Ricky Thayer on January 18, 1995, and to the unlawful delays in recalling from layoff Michelle R. Bibeau, Shawnee Johnson, LaVonne MacAdams, Thomas E. Manthey, Bobbi McNeil, Anthony Parker, Michael F. Steffes, Paul D. Thompson, and Richard A. Yuenger until April 24, 1995, and Douglas Jaeger until April 26, 1995, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that those unlawful acts will not be used against any of them in any way.

MDI COMMERCIAL SERVICES